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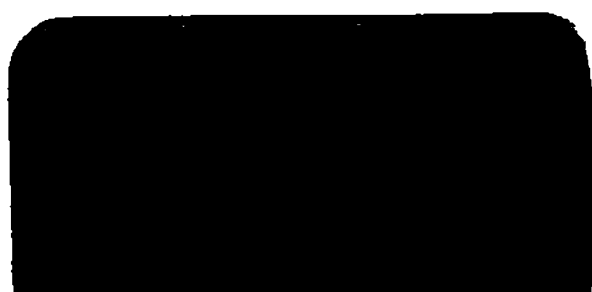
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"COTENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

VOL. XCIII.

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VOL. XCIII.

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AMERICAN DECISIONS.
VOL XCIII

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

GOODRICH v. HOOPER.

[97 MASSACHUSETTS, 1.]

ALLEGED SLANDEROUS WORDS DO NOT IMPUTE ANY CRIMINAL OFFENSE, unless it appears from the record that the words set forth, by their natural signification, when interpreted in the light of the extrinsic facts alleged, are fairly capable of such a meaning.

MEANING OF ALLEGED SLANDEROUS WORDS CANNOT BE ENLARGED BY INNUENDOS to impute a criminal offense, and where the words set out are not capable of such construction, the declaration will be adjudged bad on demurrer. The language must be read and interpreted by the court as it would ordinarily be understood by mankind.

NO INNUENDOS ARE NECESSARY UNDER MASSACHUSETTS SYSTEM OF PLEADING; but if the natural import of the words is not intelligible without further explanation or reference to facts understood but not mentioned, or parts of the conversation not stated, the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken: See Gen. Stats., c. 129, sec. 87.

WORDS WHICH DO NOT IMPUTE ANY CRIMINAL OFFENSE, AND WHICH ARE NOT ACTIONABLE. — In tort for slander, the declaration alleged that in conversations concerning the plaintiff, and his acts as collector of customs, in reference to the settlement of a claim in behalf of the United States against W., the defendant used these words: "G. [the plaintiff] had not accounted to the department for the sum paid [by W., by some \$32,000]; and also words substantially as follows: "That in the settlement for the alleged frauds by W., amounting to many hundreds of thousands of dollars, the amount paid by W. was \$157,224; that only \$125,224 was accounted for; that it was not known what had been done with the balance; and it was understood that this settlement was made through the intervention of S. and his partner, the late deputy collector; that it was discreditable to the government to have it generally known that the sum of \$157,224 was paid by W. in a settlement with the gov-

ernment, and that \$32,000 of that sum was not accounted for." *Heia*, on demurrer, that these words did not by their natural sense and meaning impute to the plaintiff any criminal offense, and were not actionable, although the plaintiff by innuendoes averred that they imputed to himself the crimes of embezzlement and of receiving a bribe, and were so understood in the conversations alleged.

TORT for slander. The declaration contained four counts. The first count alleged in substance that the plaintiff was a collector of customs; that it was his official duty to account for and pay to the United States all moneys belonging to the government received by him officially; that neglect or refusal to do so constituted the crime of embezzlement; that during his incumbency in office he was the only officer and person authorized to make settlement in behalf of the United States of claims for moneys due on account of any importations of merchandise made within it; that previous to the speaking of the alleged slanderous words, a claim had been made in behalf of the United States against J. D. & M. Williams, an importing firm doing business in Boston, for a large sum alleged to be due from them to the United States on account of certain importations of wine; that the plaintiff, acting in his capacity of collector, had settled it, and had received in all, in settlement and payment thereof, \$125,224, and no more; and that the defendant, in a conversation concerning the plaintiff and his acts in reference to this settlement, publicly, falsely, and maliciously accused him of the crime of embezzlement, by words as stated in the first quotation of the syllabus, *supra*. The words set forth in the first and third counts as shown in the first quotation in the syllabus, *supra*, were alike; and the words set forth in the second and fourth counts, as shown in the second quotation of the syllabus, *supra*, were alike. The words in the first and second counts were alleged to be an accusation of the crime of embezzlement; and those in the third and fourth counts were alleged to be a charge of bribery. The declaration was so drawn as to make either set of words referred to come within the definition of either embezzlement or bribery. The defendant demurred to this declaration as insufficient in law to support the action, upon the ground that the alleged slanderous words did not by their import, nor in connection with any facts or explanations stated in the declaration, in any manner charge or impute the crime of embezzlement or the crime of accepting a bribe, and were not in themselves actionable. The questions of law raised by the

demurrer were submitted to the full court for their determination. Other facts are stated in the opinion.

H. L. Dawes and T. K. Lothrop, for the defendant.

E. Merwin, for the plaintiff.

By Court, FOSTER, J. Each of the counts in this declaration alleges that the defendant has orally slandered the plaintiff by accusing him of a criminal offense. It is not a suit for a libel, nor for words spoken which are claimed to be slanderous in consequence of the occupation or office of the plaintiff, and the action can be maintained only upon the ground that the words set forth amount to an accusation of a punishable offense.

The demurrer asks the judgment of the court whether the language alleged to have been used, in connection with the circumstances under which it was uttered, is fairly susceptible of such a construction. The principles upon which this issue of law must be determined are familiar, and have been established by very numerous decisions. It must appear upon the record that the words set forth, by their natural signification, when interpreted in the light of the extrinsic facts alleged, are fairly capable of such a meaning. If they are not, their meaning cannot be enlarged by the innuendoes, and the declaration will be adjudged bad on demurrer. Under our present system of pleading, no innuendoes are necessary, but "if the natural import of the words is not intelligible without further explanation or reference to facts understood but not mentioned, or parts of the conversation not stated, . . . the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken": Gen. Stats., c. 129, sec. 87.

In the application of these rules to the facts of a new case, previous decisions afford comparatively little assistance. It is always a question of the construction of the language used, which must be read and interpreted by the court as it would ordinarily be understood by mankind: *Bloss v. Tobey*, 2 Pick. 328; *Carter v. Andrews*, 16 Id. 5; *Snell v. Snow*, 13 Met. 278 [46 Am. Dec. 730]; *Lee v. Kane*, 6 Gray, 495; *Barrows v. Bell*, 7 Id. 310 [66 Am. Dec. 478]; *Solomon v. Lawson*, 8 Q. B. 823.

The words set forth in the first and third counts, and in the second and fourth counts, of this declaration, are the same. In the first two they are alleged to be an accusation of the crime

of embezzlement, and in the last two as a charge that the plaintiff has been guilty of the crime of receiving a bribe to influence his official conduct as collector of the port of Boston.

We are called upon to determine whether the following words fairly and reasonably impute to the plaintiff the crime of embezzlement, as alleged in the first count, or of receiving a bribe, as alleged in the third: "Goodrich had not accounted to the department for the sum paid by the Messrs. Williams by some thirty-two thousand dollars." These words do not import, and the prefatory averments of the declaration do not allege, that Mr. Goodrich ever received the money in question, or any part of it. If it was paid, not to him, but to some one else without his knowledge, the entire statement might be correct and accurate. Much less does this language assert or intimate that he had rendered any false account or made any wrongful appropriation or improper use of the money. The statute of the United States declares that a failure to pay over or produce the public money intrusted to certain officers shall be held and taken to be *prima facie* evidence of embezzlement: U. S. Stats. 1846, c. 90, sec. 16. But this must be a failure to pay on demand: *United States v. Forsythe*, 6 McLean, 584. There is nothing in this declaration to show that this money was ever demanded of Mr. Goodrich, or that it ever became his duty to account for it to the treasury department of the United States. The fair and natural meaning of the language amounts only to this, that the Messrs. Williams, in settlement of the claims against them, had paid to some one thirty-two thousand dollars more than Mr. Goodrich had accounted for to the government. Such a statement might excite inquiry as to who had received and what had been done with this sum of money, but no ingenuity can torture it into a criminal accusation against the plaintiff.

The grounds for claiming this language to be a charge that he had received a bribe are still weaker. We are at a loss to perceive any plausible foundation for attributing to them such a meaning.

The other two counts are founded upon the following statement: "That in the settlement of the alleged frauds of Messrs. J. D. & M. Williams, amounting to many hundreds of thousands of dollars, the amount paid by them was \$157,224; that only \$125,224 was accounted for, of which \$62,612 was credited to the government, leaving the same amount (\$62,612) divided between the collector, the naval officer, and the sur-

veyor; that it was not known what had been done with the balance, amounting to the large sum of \$32,000, and it was understood that this settlement was made through the intervention of Mr. Samuel A. Way and his partner, the late deputy collector; that it was discreditable to the government to have it generally known that the sum of \$157,224 was paid by Messrs. Williams & Co., in a settlement with the government, and that \$32,000 of that sum was not accounted for."

It seems entirely plain that this language does not charge that the sum of thirty-two thousand dollars in question, or any part of it, ever came into the plaintiff's hands. It is expressly stated that it is not known what became of it, and the fact that it has not been accounted for is spoken of as discreditable to the government. No part of the assertion appears to have been an imputation directed against the plaintiff or any other individual. "When the words are not in themselves applicable to the plaintiff, no introductory averment or innuendo can give such an application": *Solomon v. Lawson*, *supra*. This language, like that in the former counts, was calculated to induce an investigation into the disposition made of the thirty-two thousand dollars unaccounted for, and such an investigation might probably include the plaintiff in consequence of his official position. But it does not amount to an express or implied accusation of any criminal offense committed by him.

The court are all of the opinion that there is nothing in the words set forth in any of the counts, which, in connection with the extrinsic facts alleged, warrants the construction claimed by the plaintiff. The language is not capable of the interpretation given to it by the innuendoes. It does not amount to a charge of crime by the defendant against the plaintiff, and the demurrer to the whole declaration is sustained.

CHARGE NEED NOT BE DIRECT AND POSITIVE TO MAKE IT SLANDEROUS; it is sufficient that from it the imputation of criminality may be inferred: *Water v. Jones*, 29 Am. Dec. 261.

IF WORDS ARE NOT ACTIONABLE IN THEMSELVES, THEIR MEANING CANNOT BE EXTENDED BY INNUENDO TO MAKE THEM ACTIONABLE: See *Sheely v. Biggs*, 3 Am. Dec. 552; *Coburn v. Harwood*, 12 Id. 37, and extended note thereto 39-46, on words actionable *per se*, and showing when words impute crime. As to necessity of colloquium and innuendoes, see *Thompson v. Lusk*, 26 Id. 91.

WORDS IN ACTION OF SLANDER ARE TO BE TAKEN IN SENSE IN WHICH HEARERS UNDERSTOOD THEM in their obvious sense and import: See note to

Thompson v. Lusk, 26 Am. Dec. 95; *Logan v. Steele*, 4 Id. 659; *Watson v. McCarthy*, 46 Id. 380, note 381.

THE PRINCIPAL CASE WAS CITED in *Adams v. Stone*, 131 Mass. 434, to the point that in tort for slander, the innuendo does not enlarge the meaning of words beyond their natural import, and that it must appear from the declaration that the words are actionable.

HUNTER v. GIDDINGS.

[97 MASSACHUSETTS, 41.]

ORAL CONTRACT FOR SALE OF PERSONAL PROPERTY IS VALID, though under the statute of frauds some memorandum in writing signed by the defendant may be necessary to enable the plaintiff to enforce it.

WHERE AGENT BUYS PERSONAL PROPERTY IN NAME OF HIS PRINCIPAL without indicating his agency, the principal may be held if he afterwards recognizes and acts upon the contract.

FACT THAT AGENT MAY BE PERSONALLY HELD UPON CONTRACT FOR SALE OF PERSONAL PROPERTY does not prevent an undisclosed principal from suing upon the contract.

WRITTEN MEMORANDUM OF CONTRACT BETWEEN H. AND G., AND SIGNED BY G. WITH HIS OWN NAME, IS SUFFICIENTLY EXECUTED WITHIN STATUTE OF FRAUDS to enable H. to enforce the contract, although H.'s name was signed to the memorandum by an attorney in fact, without adding his own name as attorney, and the memorandum contained nothing to indicate that it was executed by him as attorney, and although G., the party sought to be charged, supposed that he was contracting with the attorney personally, and that the signature which the attorney affixed was his own name; and if it is set up in defense, against the enforcement of the contract, that such supposition was caused by fraud or pretense of the attorney, that is for the jury, and not for the court, to pass upon.

CONTRACT brought upon an instrument in writing, by which the defendant agreed to cut and haul to the plaintiff's paper-mill, at Glendale, six hundred cords of wood for three dollars per cord. The memorandum was signed with the name of the plaintiff, "John S. Hunter," and with the defendant's name, "Daniel E. Giddings." J. S. Hunter's name was signed by his father, James Hunter, he being authorized to do so by power of attorney; but J. S. Hunter did not add his own signature as attorney, and the memorandum contained nothing to indicate that it was executed by him as attorney. The defendant's answer set up that one James Hunter came to him and represented himself as being John S. Hunter of Glendale, and as the identical person whose name was signed to the instrument, and thereby induced him to make the alleged contract; that so believing, he delivered 114 cords of wood to

James Hunter at the paper-mill, supposing him to be John S. Hunter, and would have delivered more, but was prevented by him; that he did not learn until afterwards that the plaintiff was not the person with whom he contracted, and that in fact no such person as John S. Hunter resided in Glendale; and therefore he denied that he ever made any contract with the plaintiff, and set up that the instrument upon which this action was brought was invalid and void, that his signature to it was unlawfully obtained, and that the plaintiff had no right to bring this action, nor had any cause of action on the contract. The plaintiff called James Hunter as a witness, and from his testimony it appeared that he did no positive act and made no affirmative assertion that would lead defendant to believe that his name was John S. Hunter. "I did n't give him to understand that I was not John S. Hunter; I suppose he thought I was John S. Hunter." He did not state to defendant that he was not John S. Hunter. The business at the Glendale paper-mill was carried on in the name of John S. Hunter. John S. Hunter told him to buy the wood, and directed him to sign his name. John S. furnished the money with which James made the payments. James Hunter testified that he lived at Glendale, and was the father of the plaintiff, who lived at Hartford, Connecticut. His testimony that he signed the name of John S. Hunter to the instrument under authority to do so was received, against defendant's objection. James Hunter was not hasty in exposing his identity, because he had once failed in business, and it was unpleasant for him to recur to it; but he had no delicacy in stating the truth when the question was put to him. There was no evidence to show that the defendant ever before the bringing of this action supposed that he was dealing otherwise than with John S. Hunter personally. The judge ruled that the contract, from the manner of its execution, was a void contract, and could not be read in evidence; that the question whether a contract was executed or not was one for the court, and not for the jury; and he directed the jury to return a verdict for the defendant; to which rulings and instructions the plaintiff alleged exceptions.

J. E. Field, for the plaintiff.

I. Sumner, for the defendant.

By Court, HOAR, J. The ruling of the learned judge at the trial was probably made upon the authority of some of the ex-

pressions used in the case of *Wood v. Goodridge*, 6 Cush. 117 [52 Am. Dec. 771]. But without considering the precise accuracy of all the observations found in the opinion in that case upon a point which was not necessary to its decision, we do not think it applicable to the case at bar.

The contract upon which this suit is brought was a contract, not under seal, for the sale of personal property. It was not essential to its validity that it should be in writing. Some memorandum in writing signed by the defendant was originally requisite to enable the plaintiff to enforce it under the statute of frauds; but the contract itself might have been oral. Upon such a contract, if made by the agent in the name of the principal without indicating the agency, the principal might be held if he had afterward recognized and acted upon it: *Merrifield v. Parritt*, 11 Cush. 590. The oral contract between the parties, if the plaintiff's signature was treated as a nullity, would support his action.

But the defendant puts his case upon the ground that he supposed he was contracting with the agent personally, and that the signature which the agent affixed was his own name. If that were so, and this supposition were caused by any fraud or false pretense of the agent, it might follow that the agent would be personally bound by the contract which he had made by the name of John S. Hunter. But the fact that the agent was personally held would not prevent an undisclosed principal from suing upon it: *Eastern R. R. Co. v. Benedict*, 5 Gray, 561 [66 Am. Dec. 384]; *Sims v. Bond*, 5 Barn. & Adol. 393; *Huntington v. Knox*, 7 Cush. 371; *Lerned v. Johns*, 9 Allen, 419.

If the fraud were of such a nature as to entitle the defendant to rescind the contract, and he undertook to rescind it on that account, those facts should have been found by the jury, and could not be assumed by the court as the basis of a ruling that the contract was void.

Exceptions sustained.

AS TO FIRST POINT IN SYLLABUS, *supra*, see *McCampbell v. McCampbell*, 15 Am. Dec. 48; *Stone v. Dennison*, 23 Id. 654.

SUBSEQUENT RATIFICATION GIVES AGENCY, FORCE, AND EFFECT of an original express authority: *Starks v. Sikes*, 69 Am. Dec. 270; *Clealand v. Walker*, 46 Id. 238.

RIGHTS AND LIABILITIES OF UNDISCLOSED PRINCIPAL. — Undisclosed principal may sue upon contract not under seal, made by or with his agent: See note to *Eastern R. R. Co. v. Benedict*, 66 Am. Dec. 389; *Cushing v. Rice*, 71 Id.

579; note to *Beebe v. Robert*, 27 Id. 137; *Foster v. Smith*, 88 Id. 604; *Tutt v. Brown*, 15 Id. 33; or be sued upon such contract: *Clealand v. Walker*, 46 Id. 238; *Taintor v. Prendergast*, 38 Id. 618; note to *Pentz v. Stanton*, 25 Id. 562; *Smith v. Plummer*, 34 Id. 530. Credit given to an agent does not exonerate the principal, if at the time that the credit was given the agency was unknown to him who gave it: *Henderson v. Mayhew*, 41 Id. 434.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where the promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent: *Exchange Bank of St. Louis v. Rice*, 107 Mass. 43; and a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer: *Byington v. Simpson*, 134 Id. 169. In a case where the name of a real person is signed without authority, as where the signature was affixed under a mistaken belief of authority, or fraudulently, or even if it was a forgery, then, although no agency was expressed on the face of the instrument, the signature may be adopted or ratified by that person, and such adoption or ratification will render him liable in a civil action, to be sued as maker thereof: *Bartlett v. Tucker*, 104 Id. 341. It is no objection to the sufficiency of the memorandum required by the statute of frauds that the seller therein named is but an agent of the owner; and on proof of the agency, the latter may sue or be sued on the contract made by his agent in his behalf: *Gowen v. Klous*, 101 Id. 454. When a contract is not averred to be written, it is taken to be verbal, and a memorandum of such a contract, although sufficient to take it out of the statute of frauds, is not the contract itself. The existence of the note or memorandum presupposes an antecedent contract, of which the writing is a note or memorandum, as respects the signatures: *Dickson v. Lambert*, 98 Ind. 491. Where no writing, under the statute of frauds, is necessary on the part of sellers, the purchaser cannot escape from the obligation of a contract signed by him, because of an attempted but ineffectual execution of the instrument by the sellers: *Dresel v. Jordan*, 104 Mass. 413.

BROWN v. PIERCE.

[97 MASSACHUSETTS, 46.]

MERE CONTRACT TO SELL PERSONAL PROPERTY WITHOUT ANY DELIVERY, either actual or symbolical, does not pass the title as against third persons, although it may have that effect as against the vendor.

AS BETWEEN TWO BONA FIDE PURCHASERS OF SAME CHATTELS, he who first obtains delivery and possession of them has the better title against the other, notwithstanding the contract of sale of the latter with the vendor may have been prior in point of time to that of the former.

FRAUD DOES NOT OF ITSELF RENDER SALE VOID, but only voidable at the election of the vendor. Until avoided or rescinded, the contract of sale remains in force, and the title to the property passes to the vendee. The vendor may, if he sees fit, set it aside on the ground that it was procured by fraud; but unless a rescission is made, the sale takes effect and the property passes.

ACTION ON IMPLIED WARRANTY OF TITLE MAY BE MAINTAINED BY VENDEE OF WOOD, where he has paid for it, but can obtain no title thereto.

RESPECTIVE RIGHTS OF PURCHASERS FROM SAME VENDOR. — Where T., by means of fraudulent representations to P., procures the sale to himself of a portion of certain chattels owned by P., but of which T. at the time is in lawful possession, and P. does no act to disaffirm T.'s title on the ground of such fraud, T. may reclaim and maintain possession of the entire portion so sold to himself against a subsequent *bona fide* purchaser to whom P. has sold and delivered part of the same under the mistaken belief that the total quantity of chattels was sufficient to satisfy both sales, although such belief was induced by the fraudulent representations of T.; and the second purchaser, in an action against P. on the warranty of title implied in the sale to himself, may recover the value of the chattels so reclaimed from him by T.

CONTRACT for breach of warranty of title to twenty-nine cords and seventy-five feet of wood, sold to the plaintiffs, Brown and another, by the defendant, to which one Thompson claimed title by force of a prior transaction between himself and the defendant. It appeared in evidence that the defendant owned a lot of woodland, and in 1864 made a written contract with Thompson, by which he "let" to Thompson "all hard and soft wood," with certain exceptions, on said wood-lot; and Thompson agreed to cut the wood for eight hundred dollars, to be paid in one-hundred-dollar payments so often as one hundred cords should be cut, the wood to be cut and piled in good marketable condition. Four hundred cords were cut and paid for, and on April 1, 1865, Thompson notified defendant in writing that he had cut the fifth hundred cords and wished pay therefor. On April 18, 1865, he and defendant agreed to cancel their contract; and defendant, trusting in Thompson's repeated statement that he had cut the fifth hundred cords, agreed that he should receive seventy-five cords thereof in settlement of their accounts. Defendant then gave Thompson a bill of sale of seventy-five cords, who gave a receipt in full of all demands and claims on contract to date. On May 30, 1865, defendant, still trusting in Thompson's statement of the quantity of wood cut, it not then having been piled or measured, and remaining on the lot in the same condition in which it was on April 18th, together with portions of the four hundred cords cut previously, bargained to the plaintiffs seventy-five cords of the wood, and on the same day met with the plaintiffs' agent to have the same measured and to deliver it to said agent. But on measuring off sixty-four and three eighths cords, it was found the wood would not hold out the seventy-five cords of Thompson. No

more was measured, and that amount was accordingly delivered to and accepted by the plaintiffs in lieu of the seventy-five cords. A bill of sale of sixty-four and three eighths cords was given by the defendant to the plaintiffs. On September 29, 1865, Thompson began to measure the wood which he claimed under his settlement with the defendant of April 18th, having knowledge that twenty-nine cords and seventy-five feet of it had been measured and delivered to the plaintiffs by the defendant, as above stated; and in the winter of 1865, Thompson took from the plaintiffs' possession, without process of law and against their remonstrance, twenty-nine cords and seventy-five feet of the wood sold by the defendant to the plaintiffs; whereupon the plaintiffs brought this action. The testimony of defendant showed that only 458 cords and 74 feet, instead of five hundred cords, had been cut, and that had the full five hundred cords been cut, as Thompson represented, there would have been enough wood to make out the seventy-five cords sold to the plaintiffs, as well as the seventy-five cords, also, for Thompson; but on this point the testimony was conflicting. The judge was of the opinion that in no aspect of the case could the jury be properly instructed to find a verdict for the defendant, and ruled that he had no legal defense; and directed the jury to return a verdict for the plaintiffs for the value of the twenty-nine cords and seventy-five feet of wood. Defendant alleged exceptions.

T. P. Pingree, for the defendant.

S. W. Bowerman, for the plaintiffs.

By Court, BIGELOW, C. J. There can be no doubt of the rule of law that a mere contract to sell personal property without any delivery, either actual or symbolical, does not pass the title as against third persons, although it may have that effect as against the vendor. As between two *bona fide* purchasers of the same chattels, he who first obtains delivery and possession of them has the better title against the other, notwithstanding the contract of sale of the latter with the vendor may have been prior in point of time to that of the former. This principle was recognized and adopted by this court on full consideration in *Lanfear v. Sumner*, 17 Mass. 110 [9 Am. Dec. 119], and has been often affirmed by subsequent decisions.

But this principle cannot avail the defendant in the present case. Thompson, with whom he made the first contract of sale of the wood, had actual possession of it at the time the bargain

was made. By the terms of the agreement for cutting the wood described in the two contracts of sale, "all hard and soft wood on the lot," with certain exceptions not material to be taken into account in this case, was "let" to said Thompson, and he was in the actual possession of it, so that when the contract of sale was entered into between him and the defendant, no delivery was necessary or could be made by the latter in order more effectually to pass the title.

Nor can the fact that Thompson procured the sale by a fraudulent misrepresentation in any way affect the rights of the parties to this suit. Fraud does not of itself render a sale void, but only voidable at the election of the vendor. Until avoided or rescinded, the contract of sale remains in force, and the title to the property passes to the vendee. The vendor may, if he sees fit, set it aside on the ground that it was procured by fraud; but unless a rescission is made, the sale takes effect and the property passes: *Thayer v. Turner*, 8 Met. 550; Chitty on Contracts, 10th Am. ed., 815. In the present case, there is nothing to show that the defendant has done any act to disaffirm Thompson's title on the ground that the sale was procured by fraud. It does not even appear that any notice of an intention to rescind the sale and claim the property has been given to Thompson by the defendant. So far as the facts are disclosed, the contract of sale between them stands as it did on the day it was entered into. On the state of facts, concerning which there was no controversy at the trial, it is clear that the defendant had no title to the wood which he had previously sold to Thompson, and of which the latter was in possession at the time of the subsequent sale of the same wood to the plaintiff. The title of the plaintiff has therefore wholly failed, and he may well maintain this action on the implied warranty of title into which the defendant entered on the sale of the wood, to recover the value of that for which he had paid, but to which he obtained no title: Chitty on Contracts, 10th Am. ed., 471.

Exceptions overruled.

AS TO FIRST POINT IN SYLLABUS, *supra*, see *Corgan v. Frew*, 89 Am. Dec. 286; *Call v. Gray*, 75 Id. 141; *Kohl v. Lindley*, 89 Id. 294, note 302.

FRAUDULENT SALE IS VOIDABLE ONLY, AND NOT VOID: See extended note to *Thurston v. Blanchard*, 33 Am. Dec. 703. If the vendor wishes to avoid it, he must rescind and reclaim the goods: Id.

THERE IS IMPLIED WARRANTY OF TITLE UPON SALE OF PERSONAL PROPERTY, and the vendee has his action against the vendor, if his title proves defective: *Fawcett v. Osborn*, 83 Am. Dec. 278.

PRATT v. LANGDON.

[97 MASSACHUSETTS, 97.]

PERSON WHO HAS NOT AGREED TO BE PARTNER, NOR HELD HIMSELF OUT AS SUCH, IS YET LIABLE AS PARTNER TO THIRD PERSONS, if by the agreement under which the business is carried on he has an interest in a certain share of the profits as profits, and a lien on the whole profits as security for his share.

PERSON NOT ACTUALLY PARTNER CANNOT BE HELD LIABLE AS PARTNER TO THIRD PERSONS who know that he is not a partner.

LIABILITY OF OSTENSIBLE PARTNER TO THIRD PERSON. — L. bought a stock of goods, hired a shop in which to carry on business, and permitted W. to carry it on in W.'s name, under an agreement that W. should pay all expenses of the business, and always keep a stock of goods on hand equal in value to the amount paid by L., and ultimately pay to L. that amount, and that L. should receive one half of the net profits of the business, and should have a right to secure himself by taking possession at any time: *Held*, that L. was liable for a debt incurred by W. for goods used in carrying on the business, to one who had sold them relying on the belief that L. was a partner in the business with W.

BURDEN OF PROOF IN ACTION ON PROMISSORY NOTE, BROUGHT BY HOLDER AGAINST MAKER, IS ON DEFENDANT to prove that the note was given in whole or in part for the price of intoxicating liquors sold by the plaintiff in violation of law.

CONTRACT upon a promissory note signed by Wilson and Langdon. The action was brought against both, but the former was defaulted. The latter alleged in defense that the note was not made by himself; that he was not a partner with Wilson; and that the note was given in whole or in part for the price of intoxicating liquors illegally sold. It appeared in evidence that the note was made and given by Wilson for the balance of an account for goods supplied by the plaintiff, which were used in the business of a refreshment saloon, and was the only note ever signed by him in the name of Wilson and Langdon. The plaintiff contended that Langdon was Wilson's partner in the business of keeping the saloon, and introduced evidence tending to prove such a partnership. While the goods supplied for the saloon were chiefly fruit and soda-water, it appeared in evidence that intoxicating liquors were sold there, and on cross-examination the plaintiff testified that he had supplied such liquors for the saloon, and received from time to time payment for them from Wilson. He had, however, kept no account of those sales or payments, except some memoranda in a small book, which had been lost. Plaintiff testified that no intoxicating liquors were included in the note; but he could not swear, nor was there

any evidence from Wilson's books, how much liquor he had so furnished, or how much money he had received on account of it. The questions as to the liability of Langdon as a partner, and as to the burden of proof concerning intoxicating liquors, were raised by instructions in the court below, and decided as in the opinion. The special issue submitted to the jury also appears there. Verdict for plaintiff, and defendant alleged exceptions to the various rulings of the court. Other facts appear in the opinion.

C. Delano, for the defendant.

S. T. Spaulding, for the plaintiff.

By Court, GRAY, J. The court is unanimously of opinion that there is nothing in the testimony of Langdon at the second trial which materially varies the facts of the case as presented to the court last year, and reported in 12 Allen, 544.

Langdon testified that he hired the place where the business was carried on, bought the stock and fixtures, and took a bill of sale in his own name, permitted Wilson to carry on business there as long as he should conduct himself well, and charged him no interest on the price of the stock and fixtures; that Wilson was to pay all the expenses of the business, and return to Langdon the value of all he put in, and if he made anything over his expenses, was to give Langdon half of what he made. Langdon's testimony that he was not a partner with Wilson is immaterial, for even as between the parties themselves whether there was a partnership is a conclusion of law from the particulars of their agreement, and the question in this case is not whether they were partners between themselves, but whether Langdon was liable as a partner to third persons. His statement on direct examination, "that he had no lien or claim on the stock there," is controlled by his testimony on cross-examination, "that he considered he had a right to take possession when he chose; that Wilson was to pay all the expenses of the business, and return to him the value of all he put in; that Wilson was to use it, and if he made anything, Langdon was to have one half the net profits." The necessary conclusion from this testimony is, that Langdon had an interest in the stock to the amount of the money which he had put in, and an interest in half the net profits of the business after paying that amount, and the expenses of carrying it on; and had the right at any time to secure him-

self by taking immediate possession, without regard to the interest or claims of Wilson or Wilson's separate creditors.

The rule of law is well settled in this commonwealth, in accordance with the earlier English authorities, that a person who has not agreed to be a partner, nor held himself out as a partner, is yet liable as a partner to third persons, if by the agreement under which the business is carried on he has an interest in a certain share of the profits as profits, and a lien on the whole profits as security for his share: *Pratt v. Langdon*, 12 Allen, 546, and cases cited.

It is true that a person not actually a partner cannot be held liable as a partner to third persons who know that he is not a partner. But this point was fully met by the special finding of the jury, that the plaintiff believed that Langdon was a copartner of Wilson in the business, and sold the goods for which the note in suit was given, relying on that belief.

The ruling that the burden of proof was on the defendant to show that the note sued on was given in whole or in part for intoxicating liquors sold by the plaintiff in violation of law was in accordance with repeated decisions of this court: *Wilson v. Melvin*, 13 Gray, 73; *Brigham v. Potter*, 14 Id. 522; *Trott v. Irish*, 1 Allen, 481.

Exceptions overruled.

PERSON IS LIABLE AS PARTNER TO THIRD PERSON, WHEN: *Fawcett v. Osborn*, 83 Am. Dec. 278; *Bromley v. Elliot*, 75 Id. 182, note 193; *Fitch v. Harrington*, 74 Id. 641; *Ellsworth v. Tartt*, 62 Id. 749.

BURDEN OF PROOF IS UPON MAKER OF INSTRUMENT TO SHOW ILLEGALITY OF CONSIDERATION: *Davis v. Bartlett*, 80 Am. Dec. 375, note 386; *Wyman v. Fiske*, 80 Id. 66, note 68; *Jennison v. Stafford*, 48 Id. 594.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The principal case was relied upon to show a copartnership, in *Brigham v. Clark*, 100 Mass. 431. A contract that one party shall furnish money and the other perform work for a given business, and that its net profits shall be equally divided between them, makes, without reference to their intent, a partnership as to third persons: *Pettee v. Appleton*, 114 Id. 114. But in a business where there is no agreement to share the profits and losses of the business, persons composing the firm do not become partners even as to third persons: *La Mont v. Fullam*, 133 Id. 586.

WHERE DEFENDANT RELIES UPON ILLEGALITY OF CONSIDERATION AS DEFENSE, the burden of proof is upon him to show it: *Andrews v. Frye*, 104 Mass. 235; *Jones v. McLeod*, 103 Id. 58. So where he defends upon the illegality of a statute, he must show it: *Goddard v. Rawson*, 130 Id. 99.

WHIPPLE v. ROBBINS.

[97 MASSACHUSETTS, 107.]

BOTH IN MASSACHUSETTS AND CONNECTICUT, ATTACHMENT BY TRUSTEE PROCESS MAY BE MADE, notwithstanding an action is pending in favor of the debtor against the trustee to recover the same debt; but this rule applies only when both suits are within the same jurisdiction.

WHERE SUIT IN ONE COURT IS COMMENCED PRIOR TO INSTITUTION OF PROCEEDINGS under attachment in another court, such proceedings cannot arrest the suit.

SUBSEQUENT TRUSTEE PROCESS IS NO ANSWER TO PRIOR ACTION IN ANOTHER JURISDICTION.

PRIOR ACTION COMMENCED IN ONE STATE MUST BE BAR TO SUBSEQUENT PROCESS IN ANOTHER to charge the defendant as the trustee of the plaintiff in the prior action.

TRUSTEE IS NEVER BY SERVICE OF PROCESS UPON HIM TO BE PLACED IN WORSE POSITION than if he were liable only to the principal defendant, and the plaintiff acquires no greater rights than the defendant himself possesses against the trustee.

PAYMENT OF EXECUTION ISSUED UPON JUDGMENT IN ACTION IN ANOTHER STATE CHARGING TRUSTEE IN FOREIGN ATTACHMENT IS NO BAR to an action previously commenced against him in Massachusetts by the principal defendant, and in which he had appeared, if the judgment in the other state charging him as trustee was obtained upon his willful default.

CONTRACT on an account annexed for work done by the plaintiff, who resided in Massachusetts. The defendants, Robbins and another, resided in Connecticut. Defendants declared in set-off upon a promissory note made by the plaintiff in Massachusetts, and indorsed in blank. On the trial it was agreed that the defendants authorized an attorney to appear for them, and sent to him, from Hartford in Connecticut, the note to be declared on in set-off to the plaintiff's claim; that after the declaration in set-off had been filed the note was returned to the defendants by their order, and they thereupon transferred it to W. F. Barker, who commenced a suit upon it against the plaintiff in Connecticut, and summoned the defendants as trustees of the plaintiff, and upon default recovered judgment; and that the defendants in this case were defaulted as trustees in that. The plaintiff did not appear personally or by attorney in the action brought against him by Barker, and had no legal notice of it. Execution was issued upon the judgment therein against the defendants as trustees, and they paid over to Barker upon it the funds in their hands belonging to the plaintiff. This was the only defense made by the defendants to the plaintiff's claim. The note constituting the defendants' claim in set-off was, by the laws of Massa-

achusetts, barred by the statute of limitations at the time of bringing this action. Judgment for the plaintiff, and defendants appealed.

J. M. Stebbins, for the plaintiff.

A. M. Copeland, for the defendants.

By Court, FOSTER, J. The trustee process in Connecticut, under which the defendant has made the payment of which he now seeks to avail himself in defense, was instituted during the pendency of the present action. Both in this commonwealth and in Connecticut an attachment by trustee process may be made notwithstanding an action is pending in favor of the debtor against the trustee to recover the same debt: Gen. Stats., c. 142, secs. 18-20; *Gager v. Watson*, 11 Conn. 168. But this rule applies only when both suits are within the same jurisdiction.

In *Embree v. Hanna*, 5 Johns. 100, an action was commenced in Maryland, and the trustee there, being subsequently arrested in New York by his creditor, the defendant in the prior suit was allowed to plead in defense the pending Maryland attachment. Chief Justice Kent said: "If the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore potior est jure*. . . . If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that if the priority of the attachment in Maryland be ascertained, the courts in that state would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here. The present case affords a fair opportunity for the settlement and application of a general rule on the subject."

In *Wallace v. McConnell*, 13 Pet. 136, an action was commenced in the district court of the United States for Alabama, and by a subsequent trustee process in one of the state courts of Alabama, the defendant was summoned as the garnishee of the plaintiff; whereupon the pending proceedings of trustee process were pleaded *puis darrein continuance* in the United States court, and a demurrer to this plea was sustained by the unanimous judgment of the supreme court of the United States. "The jurisdiction of the district court of the United States," it is said in the opinion, "and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any-proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. . . . If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal, and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit. . . . This is essential to the protection of the rights of the garnishee, and will avoid all collisions in the proceedings of different courts having the same subject-matter before them."

It is an invariable rule that a trustee is never by the service of process upon him to be placed in a worse position than if he were liable only to the principal defendant, and that the plaintiff acquires no greater rights than the defendant himself possesses against the trustee: Drake on Attachment, sec. 458.

From these principles, it follows that if the prior institution and pendency of the present action had been disclosed to the court in Connecticut, the trustee process ought to have been defeated. We must presume that the tribunals of that state would have recognized the rule that their subsequent trustee process could not be pleaded *puis darrein continuance*, or otherwise made available here to arrest or take away the plaintiff's right to prosecute the present action, and consequently that they would not have subjected the trustee to a double liability, against which he could in no way protect himself if by their judgment charged as trustee.

In short, we are bound to believe that court would have

adopted the rule of *Wallace v. McConnell*, 13 Pet. 136, that the subsequent trustee process is no answer to the prior action in another jurisdiction, and the necessary corollary from it that a prior action commenced in one state must be a bar to a subsequent process in another to charge the defendant as the trustee of the plaintiff in the prior action.

But the trustee did not make any disclosure of the pendency of the present suit. He withheld from the court in Connecticut this fact essential to a fair adjudication. He allowed himself to be defaulted, and his payment under such circumstances must be regarded as voluntary, if not collusive, and therefore no protection against the present action: *Wilkinson v. Hall*, 6 Gray, 568.

What effect we should have given to the payment under the Connecticut judgment if the trustee had been compelled to pay there notwithstanding a full disclosure of the facts, because the courts of that state had disregarded the pendency of this action and refused to adopt the principles which we regard as settled by *Wallace v. McConnell*, *supra*, is a question we need not prematurely consider: *Meriam v. Rundlett*, 13 Pick. 511.

In the present case, the plaintiff is entitled to judgment on the agreed facts.

PENDENCY OF SUIT IN ANOTHER STATE IS NOT MATTER OF ABATEMENT HERE upon the same cause of action: *West v. McConnell*, 25 Am. Dec. 191, and extended note thereto 195-197, on the effect of *lis pendens* in a sister state when pleaded in abatement, and in which is treated the effect of trustee process pending in another state, where the debtor attempts to plead it in abatement or in bar.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: If a person is summoned as trustee in another state, and is afterwards summoned as trustee of the same person in another action in Massachusetts, and the court in the other state assumes jurisdiction of the fund attached, and, after a full disclosure by the trustee of the facts relating to the suit pending and the service made in Massachusetts, renders judgment and execution against him, upon which he pays over the fund, such payment is a bar to his being charged anew in Massachusetts: *Garity v. Gigie*, 130 Mass. 186; *American Bank v. Rollins*, 99 Id. 314; *National Bank of Commerce v. Huntington*, 129 Id. 450; *Eddy v. O'Hara*, 132 Id. 62; *Adams v. Scott*, 104 Id. 166; *Merrill v. New England Ins. Co.*, 103 Id. 249; but the principal case, and *Wardle v. Briggs*, 131 Id. 519, similar to it in principle, were decided upon the ground that the defendant, who set up a judgment rendered against him as trustee in foreign attachment in another state, had not made a full disclosure of the facts to the court which rendered that judgment: *Eddy v. O'Hara*, 132 Id. 62.

BUCKLAND v. ADAMS EXPRESS COMPANY.

[97 MASSACHUSETTS, 124.]

COMMON CARRIER DEFINED. — Where it is one's business for hire to take goods from the custody of their owner, to assume entire possession and control of them, to transport them from place to place, and to deliver them at a point of destination to consignees or agents there authorized to receive them, he is a common carrier, although he styles himself an "express-forwarder," and although he contracts with others to transport the goods in vehicles of which they are the owners, and the movements of which he himself does not manage or control.

NATURE OF COMMON CARRIER'S CONTRACT. — Its essence is that goods are to be carried to their destination unless prevented by act of God or the public enemy; and this, whether the goods are carried by land or water, by the carrier himself, or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself, or under his supervision by agents and means of transportation directly and absolutely within his control.

COMMON CARRIER MAY LIMIT HIS RESPONSIBILITY BY NOTICE, if brought home to the consignor, and assented to clearly and unequivocally by him.

ASSENT TO RESTRICTION ON LIABILITY OF COMMON CARRIER, CREATED BY NOTICE, IS NOT TO BE INFERRED from the mere fact that knowledge of such notice on the part of an owner or consignor is shown. The evidence must show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered. The facts of this case do not show such assent.

CONTRACT to recover the value of a case of pistols. The defendants designated themselves as an express company and express-forwarders. It was their business to receive and undertake for hire to transmit packages to points of destination as far as their routes extended. They had entered into contracts with certain railroads, steamboats, and stage companies, and other public carriers doing business within the same parts of the country, to receive on their conveyances such packages and freight as the defendants might, from time to time, wish carried by them; but the defendants had no control over the movements of the trains of cars, steamboats, or stages transporting the freight intrusted to them. Plaintiffs, Buckland and his partner, bought the case of pistols at a factory, and left them in charge of a workman of the manufacturers to be delivered to the Adams Express Company, a common carrier, but they gave no authority to the workman to make a special contract with the defendants for the transportation of the pistols. Defendants received them and gave to the workman a receipt therefor, the terms of which purported to limit their

liability as a common carrier. It had been the daily practice of defendants, for several weeks previous, to receive packages at the factory from the manufacturers, and give similar receipts therefor. Buckland's partner was the book-keeper of the manufacturers, and had charge of these receipts. Defendants at these visits to the factory had as often as twice a week received packages from Buckland and his partner, for which one quarter of the time they had given similar receipts, not giving receipts at all the rest of the time. The case of pistols was to be forwarded by defendants to Vicksburg, Mississippi. While on its way, in the custody of defendants, a steamer in which the case was being forwarded was destroyed on the Mississippi River by the explosion of its boiler, and the goods were thereby lost. The steamer was not under the control of the defendants, and the goods were sent by the ordinary method and route of transportation. At no time did the plaintiffs express to the defendants any desire that their goods should be carried on any different terms than those expressed in the receipt, or make any expression whatever of their desire upon the subject. The defendants declined to pay for the pistols, on the ground that the terms of the receipt which they gave exonerated them from the dangers arising from river navigation and steam. It was not disputed that if, on these facts, it should be adjudged that the plaintiffs assented to the terms of the receipt, its limitations of the defendants' liability as common carriers were such as exempted them from responsibility for the loss. Other facts are stated in the opinion. Judgment for the plaintiffs, and defendants appealed.

H. Morris, for the plaintiffs.

G. Wells and N. A. Leonard, for the defendants.

By Court, BIGELOW, C. J. We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require

their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them: *Dwight v. Brewster*, 1 Pick. 50, 53 [11 Am. Dec. 133]; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189; 2 Redfield on Railways, 1-16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them, nor subject to their direction or supervision; and that the rules of the common law regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business by which the carrier was enabled to select his own servants and vehicles, and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is, that the goods are to be carried to their destination, unless the fulfillment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land

or water, by the carrier himself, or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself, or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam-power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles, and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route, by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is, that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision, or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract, or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfill the contracts into which he has entered.

It is not denied that in the present case the goods were lost or destroyed while they were being carried over a portion of the route embraced in the contract with the plaintiffs, and before they had reached the point to which the defendants had agreed to carry them. It is not a case where the agreement between

the parties was that the merchandise was to be delivered over by the defendants to other carriers at an intermediate point, thence to be transported over an independent route to the point of destination without further agency on the part of the defendants. The stipulation was, that the defendants should carry the property from the place where they received it to the point where it was to be delivered into the hands of the consignee. The loss happened before the defendants had fulfilled their promise.

The other question raised by the agreed facts is rather one of fact than of law. It is no longer open to controversy in this state that a common carrier may limit his responsibility for property intrusted to him by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service of the carrier was to be rendered: *Judson v. Western R. R. Corp.*, 6 Allen, 486—490 [83 Am. Dec. 646]. On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandise in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory when the package was delivered to the defendants' agent. It is not stated that the plaintiffs, or either of them, ever read the paper containing the alleged regulations, or one similar to it. It is agreed that the defendants received and carried like packages of merchandise for the plaintiffs at or about the time when the one in controversy was delivered for carriage, without giving the plaintiffs any receipt whatever therefor, and that this was the course of dealing between the parties in a large majority of the instances in which the defendants had been employed by the plaintiffs. From this it would appear that the ordinary course of business was for the defendants to receive merchandise from the plaintiffs without attempting to limit their liability as carriers in any manner whatever. Under such circumstances, we cannot fairly infer that the plaintiffs understood that by the delivery of a receipt for the merchandise the defendants intended to limit the lia-

bility which they ordinarily assumed in their dealings with the plaintiffs, or that the latter understood and assented to the contents of such receipt as fixing the terms on which the defendants were to transport the merchandise.

Judgment for the plaintiffs.

COMMON CARRIER DEFINED: *Hayes v. Wells, Fargo, & Co.*, 83 Am. Dec. 89; *Fish v. Chapman*, 46 Id. 393; *Doty v. Strong*, 40 Id. 773; note to *Turney v. Wilson*, 27 Id. 517; *Robertson v. Kennedy*, 26 Id. 466.

LIABILITY OF COMMON CARRIER FOR AGENCIES EMPLOYED BY HIM, which are not under his control: *Wheeler v. San Francisco etc. R. R. Co.*, 89 Am. Dec. 147, note 163; *Hooper v. Wells, Fargo, & Co.*, 85 Id. 211, note 230.

AS TO THIRD POINT IN SYLLABUS, *supra*, see *Judson v. Western R. R. Corp.*, 83 Am. Dec. 646, note 651; note to *Steele v. Townsend*, 79 Id. 57; *Western Trans. Co. v. Newhall*, 76 Id. 760, collected cases in note thereto 775; note to *Moses v. Boston and Maine R. R.*, 64 Id. 393; note to *Kimball v. Rutland etc. R. R. Co.*, 62 Id. 573; *Camden etc. R. R. Co. v. Baldauf*, 55 Id. 481; note to *Beckman v. Shouse*, 28 Id. 657; note to *Orange Co. Bank v. Brown*, 24 Id. 137; and extended note to *Cole v. Goodwin*, 32 Id. 495-507, showing the power of a common carrier to limit his liability by notice or otherwise.

AS TO FOURTH POINT IN SYLLABUS, *supra*, see *Hooper v. Wells, Fargo, & Co.*, 85 Am. Dec. 211, note 230; *Kimball v. Rutland etc. R. R. Co.*, 62 Id. 567; *Farmers' etc. Bank v. Champlain T. Co.*, 56 Id. 68, note 84; *Hale v. New Jersey Steam Nav. Co.*, 39 Id. 398; and extended note to *Cole v. Goodwin*, 32 Id. 502.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Express companies are common carriers: *United States Ex. Co. v. Backman*, 28 Ohio St. 151. A condition inserted in a shipping receipt, that a common carrier will not be liable for loss beyond a specified sum, being less than the value of the goods shipped, will not release the carrier from his common-law liability, unless the assent of the shipper to such limitation is shown; and such assent is not necessarily to be presumed from the acceptance of the bill of lading: *Adams Ex. Co. v. Stettaners*, 61 Ill. 186. The principal case was commented upon in *Grace v. Adams*, 100 Mass. 508.

HOLSDON v. GUARDIAN LIFE INSURANCE COMPANY.

[97 MASSACHUSETTS, 144.]

BURDEN IS UPON INSURANCE COMPANY TO PROVE NON-PAYMENT OF PREMIUM NOTE, in order to avoid a policy of insurance made and accepted on condition that it should cease and determine upon failure by the assured to pay when due a premium note given by him to the insurers.

WAIVER BY INSURANCE COMPANY OF CONDITION RESPECTING PAYMENT OF PREMIUM NOTE. — Where the agent of an insurance company receives payment when overdue of a premium note given to his principals by the assured, upon a policy of insurance issued by them and made and accepted on condition that it should cease and determine upon failure

by the assured to pay the note when due, and accounts for such payment to his principals, and they receive it without inquiry, they thereby waive the right to avail themselves of the delay of payment in order to avoid the policy, although the agent had no authority to waive forfeitures.

CONTRACT on a policy of insurance for two thousand dollars upon the life of one Hodsdon, the plaintiff's intestate. The policy was made and accepted on condition that it should cease and determine upon failure by the assured to pay when due any premium note given for premiums. Agents of the company were not authorized to waive forfeitures, but were authorized to receive premiums when due. The answer admitted the issue of the policy, but set up that a premium note given for the second quarterly premium upon the policy had never been paid. This note was dated January 18, 1866, and was payable in three months from date. Hodsdon died July 8, 1866. Defendants admitted the payment in cash of the premium for the first quarter, and the execution of premium notes for the three other quarters of the first year, and of all notes required by the rules of the company. A receipt was given for the cash premium. As to whether the premium note in question had been paid, the testimony was conflicting, and was submitted to the jury. And assuming that it was paid, it became a question at what time the payment was made. Upon the point as to the burden of proof and the effect of the company's receiving payment after it was due, the judge below ruled as in the opinion. Verdict for plaintiff, and defendants alleged exceptions.

J. M. Stebbins, for the defendants.

C. A. Beach and H. Morris, for the plaintiff.

By Court, GRAY, J. Upon the payment of the cash premium and giving of the premium notes by the assured to the insurers, the policy became a binding contract, although by one of the conditions annexed, upon which it was declared to be made and accepted, it was to cease and determine in case of a failure to pay any premium note when due. The terms of the receipt given for the cash premium did not change the nature of the contract of insurance in this respect. The burden of proving a breach of this executory stipulation and an avoidance of the policy by non-payment of one of the premium notes was upon the defendants: *Gray v. Gardner*, 17 Mass. 188; *Kingsley v. New England Insurance Co.*, 8 Cush. 898;

Daniels v. Hudson River Insurance Co., 12 Cush. 426 [59 Am. Dec. 192]; *Orrell v. Hampden Insurance Co.*, 13 Gray, 431.

On the point whether the premium note in question had been paid, the evidence was conflicting, and was submitted to the jury with suitable instructions. Although an agent of the company had no authority to bind them by receiving payment of a premium note after it was due, the company might receive such payment at any time. If they received the amount of the note from their agent after it was due, they were bound to inform themselves of the time when it had been paid to him; and by receiving it from him without inquiry, they waived the right to insist on the delay in the payment as a ground of forfeiture of the policy.

Exceptions overruled.

CONDITION IN INSURANCE POLICY MAY BE WAIVED BY COMPANY OR ITS GENERAL AGENT: See *Sheldon v. Atlantic etc. Ins. Co.*, 84 Am. Dec. 213, note 219, where cases are collected.

WAIVER OF CONDITIONS IN POLICIES OF INSURANCE, WHAT AMOUNTS TO: See collected cases in note to *Ripley v. Aetna Ins. Co.*, 86 Am. Dec. 372.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Burden of proving untrue a representation upon which a policy of life insurance was based is upon the insurers: *Campbell v. New England etc. Ins. Co.*, 98 Mass. 394. Insurance company may take notes for part of the premium instead of insisting on immediate payment of the whole: *McAllister v. New England etc. Ins. Co.*, 101 Id. 561. As to waiver of stipulations in agreement where time is not of the essence of the contract, see *Potter v. Jacobs*, 111 Id. 37.

HUBBARD v. HUBBARD.

[97 MASSACHUSETTS, 188.]

MERE BREACH OF CONDITION WILL NOT REVEST ESTATE IN GRANTOR UPON CONDITION EXCEPT AT HIS ELECTION. It is optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same, as a forfeiture of the estate thus granted.

TO MAKE ESTATE ON CONDITION REVEST IN GRANTOR UPON BREACH OF CONDITION, he, if not in possession, must make entry or bring action; or if in possession, he must manifest intent to hold possession by reason of the breach.

GRANTOR OF ESTATE UPON CONDITION MAY WAIVE BREACH AND FORFEITURE.

WAIVER OF BREACH OF CONDITION OF ESTATE UPON CONDITION, WHAT CONSTITUTES. — If the grantor of an estate on condition, after breach of condition, but before entry, action, or manifestation of intent to hold

possession by reason thereof, treats the condition as still subsisting and obligatory, it is a sufficient waiver of the breach.

WAIVER OF BREACH OF CONDITION SUFFICIENT TO AVOID FORFEITURE OF ESTATE UPON CONDITION. — A conveyed premises to B on condition that A and his wife should be allowed to reside thereon during their respective lives, and that so long as they should so reside, B should furnish them with comfortable maintenance and support. This condition was broken, and A waived the breach both as to himself and as to his wife. *Held*, that this waiver was sufficient to avoid forfeiture without any waiver by the wife also, although the wife joined in the deed from A to B for the purpose of releasing her right of dower and homestead rights, if any, in the premises conveyed.

WRIT of entry. This case was formerly before the court on exceptions as reported in *Hubbard v. Hubbard*, 12 Allen, 586. At the second trial the deed by the demandant, Warren Hubbard, to Warren Hubbard, Jr., the tenant of the premises in dispute, dated March 22, 1862, was introduced in evidence as at the former trial, and contained the following condition: "That the grantor and his wife, Jane Hubbard, shall be allowed to reside on said homestead during their respective natural lives, and so long as they thus reside thereon the grantee, his heirs and assigns, shall furnish them with a comfortable maintenance and support in sickness and in health, it being understood that the grantee, his heirs and assigns, with their families, may also in the mean time reside on said homestead." The demandant's wife joined with him in this deed to release her right of dower, and all her right, if any, of homestead. The demandant and his wife were living on the premises in one part of the house, and the tenant soon afterwards occupied another part of the same house. In 1864 the tenant refused longer to furnish, as he had for the two years previous, food or cooking utensils and dishes to the demandant and his wife, and told them that they must come to his table to take their meals. The wife left the premises soon afterwards, but the demandant went to the tenant's table and took his meals there. The wife remained away until after this action was brought. It was contended by the demandant that these facts showed a breach of the condition of the deed, and that the tenant's estate in the premises was forfeited, although it appeared that at the time of the alleged breach the tenant was in occupation of the premises under the deed, controlling the same, and carrying on the farm; and it did not appear that the demandant at the time of or after the alleged breach made any formal entry upon the premises, or did any

acts asserting a purpose to claim the same for breach of condition, or made any demand for the same, or declared any intention to take possession of the same for the breach, until this action was brought, in April, 1865, and that the tenant ever after the alleged breach continued to occupy and improve the premises as before. It was contended by the tenant that the demandant had waived the performance of the condition, or the breach thereof; and he offered evidence tending to prove that while the demandant's wife was away the demandant repeatedly expressed satisfaction at the change, and with the board he was receiving at the tenant's table, and said that his wife had no cause for leaving, and was desirous that she should come back. The judge admitted no evidence of acts or declarations tending to show a waiver occurring after the date of the writ; and also instructed the jury that "any expressions or acts of the demandant showing satisfaction with or consent to his mode of living at the time of such expressions or acts would not be evidence of waiver; but only such acts and declarations as referred to the acts of the tenant relied on as constituting a breach, and as related back to the transactions complained of by the demandant, could be considered by them upon the question of waiver." There was other evidence to prove a waiver, such as declarations by the demandant that he did not like the way in which his wife had cooked his victuals; that she had a gang hanging about who disturbed his rest of nights; that she had not got his meals regularly; that he was glad the change had been made, and was sorry it had not been made sooner; that he asked the tenant to allow him to come to his table, and to make the change; that he liked the cooking of the tenant's wife much better; that he had rested better and felt better since the change, and enjoyed having his meals regularly; and it appeared that in fact he received his entire support from the tenant. Demandant contended that by breach of the condition the estate of the tenant was immediately forfeited, that the title immediately reverted to the demandant, and that no subsequent acts or declarations, like those offered in evidence by the tenant, could operate by way of waiver to defeat the demandant's estate or to divest him of it. But the judge ruled that the demandant could by parol acts and declarations waive the breach of the condition and forfeiture, if there had been a breach, and that the evidence introduced was competent for the jury to consider, upon the question of waiver, under the same limitations as

were set forth in his instructions to the jury above quoted; and that if the jury believed that the demandant intended to waive the breach and forfeiture, and did waive the same before action was brought, then he could not maintain this action. It was further contended by the demandant that any waiver by himself, either of the performance or of the breach of the condition of the deed, as to his own support, would not save the forfeiture unless it was also waived by his wife as to her own support. But the judge ruled, as to her support, that it would not be sufficient for the demandant to waive the performance or breach of the condition as to his own support only, but the jury must be satisfied that he waived the same as to the support of his wife also; and further, that if the demandant and his wife both desired to live as before the change, the tenant had no right to make such change; but that if the demandant and his wife disagreed, and the demandant desired and authorized the change to be made, and his wife did not, the tenant could act upon the will, desire, and authority of the demandant, although the wife did not consent thereto. Verdict for the tenant, and the demandant alleged exceptions.

H. Morris and C. A. Winchester, for the demandant.

G. M. Stearns, for the tenant.

By Court, HOAR, J. It was held in this case when it was before us at a previous term, that the condition in the demandant's deed to the tenant had been broken, and that the estate was forfeited. On a new trial, the tenant relied upon a waiver of the breach and forfeiture, and we are of opinion that the rulings at the trial were right, and that the defense was maintained.

It is optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate thus granted. To do this requires action on his part; and if he is not in possession, usually requires an entry for breach of condition. Until such entry, the grantee holds his estate, liable only to be defeated, but not actually determined by a forfeiture: *Stone v. Ellis*, 9 Cush. 95. Under our statutes, an action has been held sufficient to indicate the grantor's intention to avail himself of the breach of condition without entry: *Austin v. Cambridgeport Parish*, 21 Pick. 215.

The plaintiff contends that, being in possession when the breach of condition occurred, the estate immediately revested in him without entry or other act; and cites in support of this position the case of *Lincoln and Kennebeck Bank v. Drummond*, 5 Mass. 321. So far as that case is an authority for the doctrine that where a grantor of an estate on condition is in possession no entry is necessary to enable him to avail himself of a breach of the condition, it is undoubtedly satisfactory. Where an entry or attempt at entry cannot be made, none can be required. The authority cited by Chief Justice Parsons is Co. Lit. 218, sec. 350, which is only to the point that the grantor of a reversion upon condition, there being an unexpired tenancy for years, will take the reversion upon breach of condition without entry, although the grantor is not in possession, and has no right to it. It is not therefore a full authority for his statement. But the facts in *Lincoln and Kennebeck Bank v. Drummond*, *supra*, show that the tenant in possession, after the breach of the condition, exercised acts of ownership; and no question of waiver arose in the case.

It is equally well settled that a mere breach of condition will not revest an estate in a grantor upon condition, except at his election; and that he may waive the breach and forfeiture: Co. Lit. 211 b; *Coon v. Brickett*, 2 N. H. 163; 1 Shep. Touch. 153; *Pennant's Case*, 3 Coke, 64.

In the case at bar there was evidence which might well satisfy the jury that there had been such a waiver, and show that it would be highly inequitable for the demandant to insist on the forfeiture. He would not have been entitled to his support from the tenant after the estate had revested; yet there was evidence that he continued to receive it for a considerable period without a suggestion that he should claim the farm as forfeited. If he treated the condition as still subsisting and obligatory upon the tenant, after the alleged breach of it, it would be a sufficient waiver.

The possession of the demandant was not that of an owner of any estate in the premises, nor as claiming title to the land, but with a wholly different purpose; and before he showed or had any intention to possess and hold the estate under and by virtue of the breach of the condition, a distinct waiver of the breach would terminate his right to avail himself of it.

Exceptions overruled.

VARIOUS POINTS OF SYLLABUS WILL BE FOUND in *Frost v. Butler*, 22 Am. Dec. 199; *Chalker v. Chalker*, 6 Id. 206; note to *Jackson v. Topping*, 19 Id. 522; and extended note to *Cross v. Carson*, 44 Id. 743-759, on deed may be avoided on breach of condition subsequent, when, how, and at whose instance. The principal case was cited in *Rogers v. Snow*, 118 Mass. 123, to the point that where a lease may be terminated upon the refusal to pay rent, at the election of the lessor, the lease remains in force unless he enters while the default continues; and in *Stockbridge Iron Co. v. Cone Iron Works*, 102 Id. 85, to the point that some act is necessary to create a forfeiture of an estate. There must be an entry or possession, with intent to hold the property for forfeiture; and there must be some manifestation of this intent.

DOYLE v. DIXON.

[97 MASSACHUSETTS, 208.]

ORAL AGREEMENT WHICH MAY OR MAY NOT BE FULLY PERFORMED WITHIN ONE YEAR IS NOT WITHIN THAT CLAUSE OF STATUTE OF FRAUDS which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to support an action thereon.

AGREEMENT IS NOT WITHIN ONE-YEAR CLAUSE OF STATUTE OF FRAUDS if it will be completely performed according to its terms and intention, if either party should die within the year.

IF AGREEMENT CANNOT BE COMPLETELY PERFORMED WITHIN ONE YEAR, the fact that it may be terminated or further performance excused or rendered impossible by the death of the promisee or of another person within a year is not sufficient to take it out of the statute of frauds.

IF DEATH OF PROMISOR WITHIN ONE YEAR MERELY PREVENTS FULL PERFORMANCE OF AGREEMENT, it is within the one-year clause of the statute of frauds; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not.

AGREEMENT NOT TO ENGAGE IN CERTAIN KIND OF BUSINESS AT PARTICULAR PLACE for specified number of years or hereafter is not within that provision of the statute of frauds which requires agreements not to be performed within one year from the making thereof to be in writing in order to support an action thereon.

CONSIDERATION, WHEN SUFFICIENT. — Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud and with full knowledge of all the circumstances.

MOTION TO SET ASIDE VERDICT FOR EXCESSIVE DAMAGES, AND AS CONTRARY TO WEIGHT OF EVIDENCE, IS ADDRESSED TO DISCRETION OF JUDGE. When the damages appear to him to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess or a portion thereof and order the verdict to stand for the residue, and no exception lies to his action.

VERDICT FOR FOUR HUNDRED DOLLARS FOR THREE MONTHS' BREACH OF AGREEMENT NOT TO ENGAGE IN CERTAIN KIND OF BUSINESS FOR FIVE YEARS will not be set aside as unwarranted by law and excessive, where the injury to the plaintiff, as by diverting his trade, was not capable of

exact proof or definite computation, but depended very much on general estimate, which was peculiarly within the province of the jury; and no exception lies to the exercise of the discretion of the presiding judge in overruling a motion to set aside the verdict as unwarranted by law upon the evidence, especially where no instruction was asked at the trial on the limit of damages which the jury would be warranted in finding upon the evidence.

CONTRACT for breach of an agreement by the defendant not to go into the grocery business in Chicopee for five years. Defendant was a grocer at Chicopee, and on November 19, 1864, he and the plaintiff made a contract that on December 1st following, plaintiff should buy, and defendant should sell, defendant's stock of goods; that defendant would give, and plaintiff should take, a lease of defendant's shop for five years at an agreed rent; that defendant should receive from the plaintiff the market value of the stock, and five hundred dollars besides as bonus; and that if either party should "back out," he should forfeit to the other two hundred dollars. On November 21st, some of plaintiff's family being sick, he wanted to go home. He wanted to take the lease at once, and "settle up the whole business." Defendant agreed to do so. In settling and adjusting matters, defendant had some flour coming, which he wanted plaintiff to take. Plaintiff did not want it. Defendant said: "If you will let me sell it, I shall not trouble you in the grocery business in Chicopee in five years." Plaintiff gave him the privilege of selling the flour; but the agreement not to go into business was not put in writing. Prior to December 1st, the plaintiff paid the bonus of five hundred dollars, and before that date the other stipulations of the contract were fully performed by the parties respectively. The defendant, however, on May 15, 1866, did go into the grocery business in Chicopee, and continued in it until the commencement of this action, on August 15th following. Plaintiff relied for cause of action upon the agreement of November 21st. Defendant claimed that the oral agreement not to go into the grocery business was within the statute of frauds; but the judge ruled that it was not. The judge then instructed the jury, among other things, at the request of the defendant: "That the plaintiff, in order to recover, must show that the contract on which he claimed was made after the agreement of November 19th was signed, and was based on an independent and new consideration; that under the contract of November 19th, as expressed in the

written memorandum, the defendant being free to trade according to his pleasure, the alleged permission by the plaintiff to sell flour was no sufficient consideration for the alleged agreement by the defendant not to go into business; that in order to constitute a consideration for the alleged contract, the plaintiff must have parted with something of value, or have foregone some right which he enjoyed, or the defendant must have acquired or received something of value, or some privilege or right which he had not before." The judge further instructed the jury, at the plaintiff's request, that "if the plaintiff agreed with the defendant on November 21st to settle and adjust all matters on that day, and waived his right to forfeit the two hundred dollars named in the written contract, that agreement would be a good consideration for the promise not to engage in business for five years"; and upon the defendant's objecting to this instruction, he instructed further, that "if there was any act or agreement done or made by the plaintiff on November 21st which was valuable to the defendant, it would support the agreement, if proved, on the part of the defendant to refrain from the business." The only evidence on the question of damages was that of the defendant, who testified that the business of the shop he opened in May was about eleven hundred dollars per month, mostly derived from customers who had formerly traded with him at the old shop; and that of one McGrath, who testified that he became the plaintiff's partner immediately after the plaintiff's purchase of the stock, and that the amount of trade at their shop was lessened after the defendant opened his shop in May between two hundred and three hundred dollars per month, on which their profit would have been twenty-five per cent. A verdict for eight hundred dollars damages was returned for the plaintiff, which the defendant moved to set aside as excessive, and as contrary to the weight of evidence. The judge considered the damages excessive, but as the plaintiff offered to remit four hundred dollars, ordered the verdict to stand for the balance. Defendant alleged exceptions to this order, to the ruling of the judge upon the plaintiff's request for instructions, and to the ruling in regard to the statute of frauds.

A. L. Soule, for the defendant.

G. M. Stearns, for the plaintiff.

By Court, GRAY, J. It is well settled that an oral agreement, which according to the expression and contemplation of the parties may or may not be fully performed within a year, is not within that clause of the statute of frauds which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement, therefore, which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in *Peters v. Westborough*, 19 Pick. 364 [31 Am. Dec. 124], it was held that an agreement to support a child until a certain age, at which the child would not arrive for several years, was not within the statute, because it depended upon the contingency of the child's life, and if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated or further performance excused or rendered impossible by the death of the promisee or of another person within a year is not sufficient to take it out of the statute. It was therefore held in *Hill v. Hooper*, 1 Gray, 131, that an agreement to employ a boy for five years, and to pay his father certain sums at stated periods during that time, was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year: *Lyon v. King*, 11 Met. 411 [45 Am. Dec. 219]; *Worthy v. Jones*, 11 Gray, 168 [71 Am. Dec. 696]. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either

form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds.

The agreement of the plaintiff to settle and adjust all matters between the parties, and to sign the lease, on the 21st of November, ten days before the time when he was bound by the written contract to do so, was a legal consideration for the defendant's agreement. Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit of the promisor, is a sufficient consideration for a promise made without fraud, and with full knowledge of all the circumstances: *Burr v. Wilcox*, 13 Allen, 273, and cases cited.

The defendant has no ground of exception to the action of the superior court upon the motion for a new trial. Such a motion, so far as it depends upon the weight of evidence or other matter of fact, is exclusively addressed to the discretion of the presiding judge. When the damages awarded by the jury appear to the judge to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue: *Lambert v. Craig*, 12 Pick. 199; *Hurry v. Watson*, 4 Term Rep. 659, note; *Blunt v. Little*, 3 Mason, 107. The judge in this case having adopted the latter course, and ordered the verdict to stand for the sum of four hundred dollars, the only question of law arising thereon is whether the law would warrant a verdict for this amount. The injury to the plaintiff by diverting his trade was not capable of exact proof or definite computation, but depended very much on general estimate, which was peculiarly within the province of the jury: *Marsh v. Billings*, 7 Cush. 333 [54 Am. Dec. 723]; *Earle v. Sawyer*, 4 Mason, 14; *Stephens v. Felt*, 2 Blatchf. 37, 39. It is impossible to say that upon the evidence at the trial, and such inferences and estimates as the jury might rightfully make, a verdict for four hundred dollars was not war-

ranted by law. Moreover, any questions of law involved in the motion to set aside the verdict were open to the defendant at the trial, and no instruction in point of law having been then requested as to the limit of the damages which the jury would be warranted upon the evidence in finding, no exception lies to the rulings upon such questions on the motion for a new trial: *Kidney v. Richards*, 10 Allen, 419.

Exceptions overruled.

ORAL AGREEMENT WHICH MAY OR MAY NOT BE FULLY PERFORMED WITHIN ONE YEAR is not within the one-year clause of the statute of frauds: *Lyon v. King*, 45 Am. Dec. 219; note to *Hill v. Jamieson*, 79 Id. 418; note to *Blanding v. Sargent*, 66 Id. 722; *Houghton v. Houghton*, 77 Id. 69; *Sanborn v. Fireman's Ins. Co.*, 77 Id. 419; *Gadsden v. Lance*, 37 Id. 548; *Peters v. Westborough*, 31 Id. 142; *Linacott v. McIntire*, 33 Id. 602.

AGREEMENT IS NOT WITHIN ONE-YEAR CLAUSE OF STATUTE OF FRAUDS, if it would be completely performed, where either party should die within the year: *Lyon v. King*, 45 Am. Dec. 219; *Worthy v. Jones*, 71 Id. 696; *Hill v. Jamieson*, 79 Id. 414, note 418; *Peters v. Westborough*, 31 Id. 142.

IF PROMISOR'S DEATH WITHIN ONE YEAR WOULD LEAVE AGREEMENT FULLY PERFORMED, and its purpose fully carried out, it is not within the one-year clause of the statute of frauds: *Lyon v. King*, 45 Am. Dec. 219; *Worthy v. Jones*, 71 Id. 696; *Hill v. Jamieson*, 79 Id. 414, note 418; *Peters v. Westborough*, 31 Id. 142.

PROMISE NOT TO ENGAGE IN RIVAL BUSINESS IS NOT WITHIN ONE-YEAR CLAUSE OF STATUTE OF FRAUDS: See note to *Hill v. Jamieson*, 79 Am. Dec. 418; note to *Blanding v. Sargent*, 66 Id. 722; *Worthy v. Jones*, 71 Id. 696; nor an agreement to support a person for a number of years: *Peters v. Westborough*, 31 Id. 142; nor an agreement to render personal services for an indefinite period or a term of years: *Hill v. Jamieson*, 79 Id. 414; nor a parol agreement not to engage in particular business in a certain place, — for such contracts may be performed by death of the promisor within the year: *Lyon v. King*, 45 Id. 219; note to *Worthy v. Jones*, 71 Id. 697.

EXCESSIVE DAMAGES, SETTING ASIDE VERDICT ON GROUND OF: See collected cases in note to *Ross & Co. v. Innis*, 85 Am. Dec. 381.

MATTERS WITHIN DISCRETION OF LOWER COURT WILL NOT BE INTERFERED WITH WHEN: *Winslow v. Minnesota etc. R. R. Co.*, 77 Am. Dec. 519; *Riddle v. Gage*, 75 Id. 151; *Cummings v. Smith*, 79 Id. 629.

CONSIDERATION "OF SOME VALUE" SUFFICIENT TO SUPPORT CONTRACT WHEN: See *Shepard v. Rhodes*, 84 Am. Dec. 573, note 578.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: No agreement is void under statute of frauds as "not to be performed within a year," if, consistently with its terms, it may be performed within that period: *Jilson v. Gilbert*, 26 Wis. 642; *Blakeney v. Goode*, 30 Ohio St. 365; *Somerby v. Buntin*, 118 Mass. 286; *Dean v. Tallman*, 105 Id. 444; *Frary v. Sterling*, 99 Id. 462. An agreement not to engage in a rival business is not within the statute: *Welz v. Rhodius*, 87 Ind. 12. In *Mallett v. Lewis*, 61 Miss. 109, an oral agreement to buy goods from a person exclusively for five years if he would sell as reasonably as others was held to be within the statute. This was so held notwithstanding the fact that the contract was

personal, and that it would necessarily be ended by the death of the obligor, which fact, according to the principal case, would have taken it out of the operation of the statute. The principal case was criticised, and the court placed its decision upon the ground that the time named by parties is of the essence of the contract, and constitutes the very basis of their agreement. Motion for new trial upon ground that the damages found by the jury were excessive is addressed to discretion of court, and his decision thereon is not reviewable, unless it involves a question of law: *Merritt v. Morse*, 113 Mass. 274; *Corcoran v. Harran*, 55 Wis. 127. Plaintiff cannot avail himself of a point of law not raised at the trial as a ground of setting aside the verdict on a motion for a new trial: *Whittaker v. Inhabitants of West Boylston*, 97 Mass. 274.

WHAT CONTRACTS ARE WITHIN STATUTE OF FRAUDS BECAUSE NOT TO BE PERFORMED WITHIN ONE YEAR. — Lord Holt, in *Smith v. Westfall*, 1 Ld. Raym. 316, said that the design of the statute of frauds was not to trust to the memory of witnesses for a longer time than one year. The statute was designed for the prevention of fraud and perjury, and thus to guard against the mistakes arising from imperfect recollection. There are numerous cases, many of them in this series as shown in notes above, holding that contracts which may or may not be performed within one year are not within the statute; and that the statute does not apply where the contract can, by any possibility, be fulfilled or completed in the space of a year, although the parties may have expected that its operation would extend through a much longer period: *McPherson v. Cox*, 96 U. S. 404; *Walker v. Johnson*, 96 Id. 424; *Burney v. Ball*, 24 Ga. 505; *Moore v. Fox*, 10 Johns. 244; S. C., 6 Am. Dec. 338; *Thouvenin v. Lea*, 26 Tex. 612; *Blanchard v. Weeks*, 34 Vt. 589; *Sherman v. Champlain Trans. Co.*, 31 Id. 162; *McGinnis v. Cook*, 57 Id. 36; S. C., 52 Am. Rep. 115; *Rogers v. Brightman*, 10 Wis. 55; *Thompson v. Gordon*, 3 Strob. 196; *Blanding v. Sargent*, 33 N. H. 239; S. C., 66 Am. Dec. 720; *Esty v. Aldrich*, 46 N. H. 127; *Broadwell v. Getman*, 2 Denio, 87; *Lockwood v. Barnes*, 3 Hill, 128; S. C., 38 Am. Dec. 620; *Roberts v. Rockbottom Co.*, 7 Met. 46; *Derby v. Phelps*, 2 N. H. 515; *McLees v. Hale*, 10 Wend. 426; *Plimpton v. Curtiss*, 15 Id. 336; *Kent v. Kent*, 18 Pick. 569; *Peters v. Inhabitants of Westborough*, 19 Id. 364; S. C., 31 Am. Dec. 142; *Blake v. Cole*, 22 Pick. 97; *Suggett v. Cason*, 26 Mo. 221; *Foster v. McO'Blenis*, 18 Id. 88; *Soggins v. Heard*, 31 Miss. 429; *Wiggins v. Keizer*, 6 Ind. 252; *Ellicott v. Peterson*, 4 Md. 476; *Clark v. Pendleton*, 20 Conn. 508; *Russell v. Slade*, 12 Id. 455; *Blakeney v. Goode*, 30 Ohio St. 350; *Thomas v. Hammond*, 47 Tex. 42. But the object of this note is not to show the exceptions and limitations of the rule as to when the statute does not apply; it is to show what cases come within the statute. A contract which cannot be fully performed within one year is manifestly and directly within the provisions of the statute of frauds: *Swift v. Swift*, 46 Cal. 267; *Lockwood v. Barnes*, 3 Hill, 128; S. C., 38 Am. Dec. 620; *Summerall v. Thoms*, 3 Fla. 298; *Frary v. Sterling*, 99 Mass. 461. Thus in *Herrin v. Butters*, 20 Me. 119, an agreement to clear and sow land in consideration of being allowed to take the profits for three years was held to be insusceptible of performance in a year, and consequently invalid without a writing. The same is true of a lease for a single year to commence *in futuro*: *Cronwell v. Crane*, 7 Barb. 191; *Delano v. Montague*, 4 Cush. 42; of a hiring for more than a year, at so much per month or per day: *Tuttle v. Sweet*, 31 Me. 555; and of every other contract which cannot be finally and fully performed until after the expiration of a year from the time at which it is made, whether the delay arises from the remoteness of the period at which the performance

of the contract is to commence, or the length of time during which it is to continue: *Amburger v. Marvin*, 4 E. D. Smith, 393; *Wilson v. Martin*, 1 Denio, 602; *Comstock v. Ward*, 22 Ill. 248; *Atwood v. Fox*, 30 Mo. 499; *Moore v. Fox*, 10 Johns. 244; S. C., 6 Am. Dec. 338.

The rule laid down in some of the cases is, that to bring a case within the statute of frauds it must appear from the express terms of the agreement that it is not to be performed within a year: *Marcy v. Marcy*, 9 Allen, 8; *Russell v. Slade*, 12 Coun. 455; *McPherson v. Cox*, 96 U. S. 416; *Walker v. Johnson*, 96 Id. 424; *Moore v. Fox*, 10 Johns. 244; S. C., 6 Am. Dec. 338; *Burney v. Ball*, 24 Ga. 505; *Thouvenin v. Lea*, 26 Tex. 614; *Rogers v. Brightman*, 10 Wis. 55; *Thompson v. Gordon*, 3 Strob. 196; *Broadwell v. Getman*, 2 Denio, 87; *Lockwood v. Barnes*, 3 Hill, 128; S. C., 38 Am. Dec. 620; *Plimpton v. Curtiss*, 15 Wend. 336; *Wiggins v. Keizer*, 6 Ind. 252; *Ellicott v. Peterson*, 4 Md. 476; *Thomas v. Hammond*, 47 Tex. 42. The doctrine upon which the courts have proceeded is stated in *Heflin v. Milton*, 69 Ala. 354, as follows: The statute does not apply to a contract the performance of which is dependent upon an event or contingency which may or may not happen within a year; but to contracts which from their very nature are incapable of performance within that time, or of which by express stipulation performance is postponed for a longer period. That a contract cannot be performed within a year means, of course, not a natural or physical impossibility, but an impossibility by the terms of the contract itself, or by the understanding and intention of the parties as shown by the contract. The statute includes only such agreements as, fairly and reasonably interpreted, do not admit of a valid execution within the space of a year from the making: *Kimmins v. Oldham*, 27 W. Va. 258; *Jilson v. Gilbert*, 26 Wis. 641, 642; *Blair Town Lot etc. Co. v. Walker*, 39 Iowa, 406; *Hinkle v. Fisher*, 104 Ind. 84; *Herrin v. Butters*, 20 Me. 119; *Wilson v. Ray*, 13 Ind. 1. Thus entire contracts extending over a year are within the statute of frauds: *Nones v. Homer*, 2 Hilt. 116; *Johnson v. Trinity Church Society*, 11 Allen, 123; *Cowles v. Warner*, 22 Minn. 449; *Packet Co. v. Sickles*, 5 Wall. 580; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421; as a promise to make four annual deposits in a savings fund, though two deposits had been made: *Parks v. Francis*, 50 Vt. 626; or to sell and deliver the crops raised in successive years: *Atwood v. Fox*, 30 Mo. 499; *Holloway v. Hampton*, 4 B. Mon. 416. A partnership for more than a year is within the statute of frauds, though there is conflict of authority on this point: 1 Reed on Statute of Frauds, sec. 191, and cases there cited. A contract for a year beginning at a future date is within the statute: Id., sec. 193, with English and Canadian cases there cited: *Scoggin v. Blackwell*, 36 Ala. 351; *Comstock v. Ward*, 22 Ill. 248; *Hearne v. Chadbourne*, 65 Me. 302; *Cowles v. Warner*, 22 Minn. 452; *Sharp v. Rhinel*, 55 Mo. 97; *Nones v. Homer*, 2 Hilt. 116; *Smith v. Bowler*, 1 Disn. 520; *Wilson v. Martin*, 1 Denio, 602; *Briar v. Robertson*, 19 Mo. App. 66; *Spencer v. Halstead*, 1 Id. 606; S. C., How. App. Cas. 319; *Little v. Wilson*, 4 E. D. Smith, 422; *Turnow v. Hochstadler*, 7 Hun, 80; *Oddy v. James*, 48 N. Y. 685; *Vaughn v. De Wandler*, 63 How. Pr. 381; *Amburger v. Marvin*, 4 E. D. Smith, 393; *Blanck v. Littell*, 9 Daly, 268; *Sutcliffe v. Atlantic Mills*, 13 R. I. 480; S. C., 43 Am. Rep. 39, and note thereto 42, showing when contracts of service are within the statute: *Jones v. Hay*, 52 Barb. 501; *Sutcliffe v. Atlantic Mills*, 13 R. I. 480; S. C. 43 Am. Rep. 39. Thus a contract to farm for a year, the work to begin after the date of the contract, is within the statute: *Atwood v. Norton*, 31 Ga. 507; *Comstock v. Ward*, 22 Ill. 248; *Nones v. Homer*, 2 Hilt. 116. A contract to serve for a year, the service to begin five days from date, is as much within the statute

as if the five days were five years: *Kleeman v. Collins*, 9 Bush, 463. Contracts unilateral as well as mutual are within the one-year clause of the statute of frauds: *Cabot v. Haskins*, 3 Pick. 94.

The following are some examples of contracts not to be performed within a year: Thus a contract to keep a mare and the colt which should be born of the mare till the colt could be weaned, and then to sell the colt for a certain price. The period of gestation would be eleven months, and that of suckling four to six months more: *Lockwood v. Barnes*, 3 Hill, 128; S. C., 38 Am. Dec. 620; *Anonymous*, 11 Pac. C. L. J. 452. So to pay certain money out of the profits of a farm, which profits were to be got from certain nut-bearing trees not yet planted: *Swift v. Swift*, 46 Cal. 269. So a contract in the spring of one year for the potato crop of the next: *Pitkin v. Noyes*, 48 N. H. 297. So to canvass for a book through certain districts which the plaintiff acknowledged would have taken two years: *Davies v. Appleton*, 25 U. C. C. P. 376. So an agreement to sell a certain article found, a statute of the state where the article was found forbidding the sale of things found under a year: *Cummings v. Stone*, 13 Mich. 70. So an agreement made by one who sold a patent right that he would refund the price paid if the purchaser did not in three years realize the amount paid in profits: *Lapham v. Whipple*, 8 Met. 59; S. C., 41 Am. Dec. 487. So with a contract to deliver a crop of hemp raised the present year and that of two succeeding years: *Holloway v. Hampton*, 4 B. Mon. 416; *Lawrence v. Woods*, 4 Bosw. 354; *Bartlett v. Wheeler*, 44 Barb. 162. So with a mortgagee's promise, at the time of entering to foreclose, that if he shall sell the place he will pay the mortgagor all he receives beyond the mortgage debt; as he cannot sell in less than three years, the statute applies: *Frary v. Sterling*, 99 Mass. 461. So a contract to marry at the end of five years has been held to be within the New Hampshire statute: *Derby v. Phelps*, 2 N. H. 515; but contracts to marry are generally held to be not within the statute: *Clark v. Pendleton*, 20 Conn. 495. A contract made in October for the cultivation of lands during the remainder of that year and the whole of the next is within the statute: *Treadway v. Smith*, 56 Ala. 346. So is a sale of fruit-trees which will not yield within a year from sale: *Gregory v. Underhill*, 6 Lea, 207. So is a parol executory agreement between an individual and a railroad company that the latter shall continue to stop with their cars at a particular place adjacent to his property: *Pitkin v. Long Island R. R. Co.*, 2 Barb. Ch. 221; S. C., 47 Am. Dec. 320. So is a contract between a railroad company and the widow of a person killed by one of its trains, whereby she agrees not to sue for damages, and the company thereupon agrees to support her and her three children (all minors) during her life, and in the event of her death before the majority of the youngest child, to support the children until then. The happening of such an extraordinary contingency as the death of the widow and all three children within the year might defeat the performance of the contract, but that would not take the case out of the statute: *Deaton v. Tennessee Coal etc. Co.*, 12 Heisk. 655.

Where the contract expressly stipulates for a performance requiring a period greater than a year, the statute of frauds applies of course: *Foote v. Emerson*, 10 Vt. 338; S. C., 33 Am. Dec. 205; *Peters v. Inhabitants of Westborough*, 19 Pick. 364; S. C., 31 Am. Dec. 142. Thus to supply a saw-mill with timber for two years: *Patten v. Hicks*, 43 Cal. 509. So a contract to pay for certain chattels by installments, the latest in fourteen months from date: *Tiernan v. Hicks*, 65 Ill. 354. So with a contract to take care of sheep for five years, and to have a share of the increase each year: *Ray v. Young*, 13 Tex. 550; and see *Buckley v. Buckley*, 9 Nev. 373. So of a contract to buy

certain sheep to double their number every four years, and to deliver them to the other party, then a child, when he came of age: *Weir v. Hill*, 2 Lana. 278. So with a promise to pay one hundred dollars in four equal annual installments: *Parks v. Francis*, 50 Vt. 626; S. C., 28 Am. Rep. 517. So with a promise not to sue for a limited time beyond one year: *Mills v. Told*, 83 Ind. 25; but a promise to refrain for an indefinite time would not be within the statute: *Dougherty v. Rosenberg*, 10 Pac. C. L. J. 423. A promise by a father to pay his daughter, then eighteen years of age, five thousand dollars upon her marriage, if she would stay at home and take care of the family, is without consideration for the period between eighteen and twenty-one, the father being at any rate entitled to her services, and after that time is within the one-year clause of the statute of frauds: *Bolton v. Terpenney*, 14 N. Y. Week. Dig. 533. So an equitable mortgage by deposit of title-papers is within the statute: *Gothard v. Flynn*, 25 Miss. 58. The commonest case of continuing contracts is that of service; and where the period agreed upon is longer than a year, the statute of frauds applies to the contract: *Drummond v. Burrell*, 13 Wend. 307; *Hill v. Hooper*, 1 Gray, 131; *Peters v. Westborough*, 19 Pick. 364; S. C., 31 Am. Dec. 142; *Jones v. Hay*, 52 Barb. 501; *Briggs v. Smith*, 4 Daly, 110; *Tuttle v. Sweet*, 31 Me. 556; *Pitcher v. Wilson*, 5 Mo. 46; *Tague v. Hayward*, 25 Ind. 427; *Ellicott v. Peterson*, 4 Md. 477; *Emery v. Smith*, 46 N. H. 151; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421; extended note to *Sutcliffe v. Atlantic Mills*, 43 Am. Rep. 42, showing when the statute applies to contracts for service. Thus if a party contracts to work for two years for a given sum, and quits at the end of six months, the contract is within the statute; but if he contract for an indefinite time, to be paid by the week or month, the statute would not apply: *Ellicott v. Peterson*, 4 Md. 476. An agreement made one week prior to August 1, 1857, to enter the service of another, and continue therein until August 1, 1858, is within the statute: *Nones v. Homer*, 2 Hilt. 116. So is an oral agreement by an employee that he will not leave the service of his employer for two years, nor in the summer, nor without two weeks' notice: *Bernier v. Cabot Mfg. Co.*, 71 Me. 506; S. C., 36 Am. Rep. 343. So is an oral agreement, made on December 31st, for services to be rendered for a period of one year, which is to terminate on December 31st of the following year: *Levison v. Stix*, 10 Daly, 229. This case was decided upon the principle that the day upon which time is set running is to be excluded from the computation of time, and if the time of performance is to be a full year, the contract cannot be performed within the year within which it was made: See *contra*, as to this point, *Dickson v. Frisbee*, 52 Ala. 165; S. C., 23 Am. Rep. 565; and compare *McAleer v. Cornung*, 18 Jones & S. 63.

An oral contract for services to be begun but not to be completed within one year from the making of the contract is within the statute, and void, although made subject to determination sooner on the happening of a certain event: *Hinckley v. Southgate*, 11 Vt. 428; *Meyer v. Roberts*, 46 Ark. 80; S. C., 55 Am. Rep. 567. A contract of employment for a year, to commence on a day subsequent to the making of the contract, is void under the statute of frauds, as well as all other contracts to commence *in futuro*: See cases *supra*, referring to such contracts; *Blanck v. Littell*, 9 Daly, 268. It must be noticed, however, that where services have been performed under a contract within the statute, and the defendant relies upon the statute, the plaintiff may still have his remedy and recovery upon a *quantum meruit*: *Ellicott v. Peterson*, 4 Md. 476; *Emery v. Smith*, 46 N. H. 151; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421; *Kleeman v. Collins*, 9 Bush, 460; but see *Swanney v. Moore*,

22 Ill. 63; *Duff v. Snider*, 54 Miss. 245; *Towsley v. Moore*, 30 Ohio St. 185; S. C., 27 Am. Rep. 434. For other examples of contracts held to be within the statute as not to be performed within one year, see *Shipley v. Patton*, 21 Ind. 169; *Marcy v. Marcy*, 9 Allen, 8; *Roberts v. Tennell*, 3 T. B. Mon. 247; *Delano v. Montague*, 4 Cush. 42; *Lower v. Winters*, 7 Cow. 263; *Kellogg v. Clark*, 23 Hun, 393; *Southwell v. Beezley*, 5 Or. 143; S. C., 5 Id. 458; *Herrin v. Butters*, 20 Me. 119; *Atwood v. Norton*, 31 Ga. 507; *Spencer v. Halstead*, 1 Denio, 606; *Davenport v. Gentry*, 9 B. Mon. 427; *Hinckley v. Southgate*, 11 Vt. 428; *Atwood v. Fox*, 30 Mo. 499; *Hearne v. Chadbourne*, 65 Me. 302; *Lammott v. Gist*, 2 Har. & G. 433; S. C., 18 Am. Dec. 295; *Boydell v. Drummond*, 11 East, 141; *Grover v. Buck*, 34 Mich. 519; *Kimmins v. Oldham*, 27 W. Va. 258; *Groves v. Cook*, 88 Ind. 169; S. C., 45 Am. Rep. 462; *Judd v. Arnold*, 31 Minn. 430. As to enforcement of contracts because of part performance, see extended note to *Norton v. Preston*, 32 Am. Dec. 129-131; and as to what acts constitute part performance of verbal contract so as to take the case out of the statute of frauds, see extended note to *Christy v. Barnhart*, 53 Id. 539-547. Where a verbal agreement exists for service to commence *in futuro*, an entry upon the employment, with the acquiescence of the employer, but without a new contract, does not take the case out of the statute of frauds, and the employer is not liable under the contract: *Oddy v. James*, 48 N. Y. 685. The statute applies only to contracts not to be performed on either side within a year: *Smalley v. Greene*, 52 Iowa, 241; *Houghton v. Houghton*, 14 Ind. 505; S. C., 77 Am. Dec. 69; and executed agreements are not affected by the year clause: *Bennett v. Matson*, 41 Ill. 332; *Slatter v. Meek*, 35 Ala. 528; *Swansey v. Moore*, 22 Ill. 63. It is only executory contracts that are avoided by the statute of frauds: See case last cited; *Craig v. Vanpelt*, 3 J. J. Marsh. 490. Contracts under the statute are severable, and the valid part of a severable contract may be enforced: *Haynes v. Nice*, 100 Mass. 327; *Southwell v. Beezley*, 5 Or. 458. Effect is to be given to an oral contract if proved, unless upon the whole case it appears affirmatively that it is not to be fully performed within a year: *Farwell v. Tillson*, 76 Me. 227. And it is to be observed that a parol contract not to be performed in one year is not necessarily void for all purposes. It is generally void for the purpose of bringing an action upon it; but it may be valid for the purpose of being a consideration for some other contract which is put in writing, and signed by the parties to be charged therewith: *Stout v. Ennis*, 28 Kan. 706. And a court of equity will not permit a party who has received a valuable consideration for the performance of a parol agreement, to be fulfilled more than a year from its date, to set up the statute of frauds as a bar to its specific execution, as such cases are not regarded as being within the purview and design of the statute. To prevent a fraud, the court will decree a specific execution of the contract: *Hardesty v. Jones*, 10 Gill & J. 417. Contracts respecting realty are not within the section as to contracts not to be performed in one year in the statute of frauds: *Young v. Dake*, 55 Am. Dec. 356.

TITUS v. INHABITANTS OF NORTHBRIDGE.

[97 MASSACHUSETTS, 258.]

LIABILITY OF TOWN FOR INJURY CAUSED BY UNCONTROLLABLE HORSE COMING UPON DEFECT IN HIGHWAY. — Where a horse, which being driven with due care upon a highway which a town is bound to keep in repair, becomes, by reason of fright, disease, or viciousness, actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, as upon a place defective for want of a railing, and by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable if he merely shies or starts, or is momentarily not controlled by his driver.

TORT for injuries alleged to have been caused to the plaintiff and his wife, and his horse and wagon, by reason of a defect in a highway. The facts are briefly stated in the opinion. There was evidence that the plaintiff used due care in managing the horse at the time of the accident; but that the horse had a sudden attack of a disease called megrims, being a nervous disorder affecting the brain of horses, rendering them unconscious and uncontrollable by the rein for the time being, and causing them sometimes to bear off blindly out of their proper course, and often coming on suddenly without any previous indication, and rendering the horse uncontrollable at this time. Plaintiff offered evidence tending to show that the horse was a safe one, free from any vicious habits or any known or previously manifested disease, except that he had been occasionally known to shy a little, but never to such an extent as to become unmanageable. Verdict for the plaintiff, and the defendants alleged exceptions.

G. F. Hoar, for the defendants.

H. B. Staples and C. G. Keyes, for the plaintiff.

By Court, CHAPMAN, J. It appears that the plaintiff's horse became diseased while traveling on the highway, and thereby became unmanageable. He ceased to obey the rein; bore to the left hand in spite of all the plaintiff could do to stop him, and after continuing on in this way for sixty-five or seventy feet, went over a bank wall on the left side of the road, where it was defective for want of a railing, and thus occasioned the injury complained of.

The case is substantially like that of *Davis v. Dudley*, 4

Allen, 557, where the court remarked that the injury was occasioned by "the blind violence of the animal, acting without guidance or discretion." It is true that in that case the horse had broken loose from the sleigh, and had left it and the driver at some distance behind him, when he came upon the defect and received the injury. But the driver's control over the horse was as effectually lost in this case as in that; and in both cases the action of the horse, after he became uncontrollable, occasioned the injury.

And this case is unlike that of *Palmer v. Andover*, 2 Cush. 800; for in that case, after the horses broke loose from the carriage, they ran away and did no injury, and if the place where they left the carriage had been ascending ground, the carriage would have remained where it was, and no injury would have happened to the passengers. But the bolt was drawn out at a place where the carriage was going down hill, and the natural laws of gravitation and motion carried it to the place where the road was defective. It is not inconsistent with the decision in that case, as explained and limited in *Rowell v. Lowell*, 7 Gray, 100 [66 Am. Dec. 464], and in *Davis v. Dudley*, *supra*, to hold that the defendants are not liable for an injury occasioned, as this has been, by the action of a horse that was at the time of the accident unfit for use, and was beyond the driver's control, although the defect in the highway was also a cause of the injury.

The court are of opinion that when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver.

Exceptions sustained.

LIABILITY OF TOWNS OR CITIES FOR INJURIES WHICH WERE CAUSED BY COMBINED RESULT OF ACCIDENT AND DEFECT IN HIGHWAY: See *City of Joliet v. Verley*, 85 Am. Dec. 342, note 346; note to *Lund v. Inhabitants of Tyngsborough*, 59 Id. 163. As to liability of towns where they fail in their duty to erect railings upon highway, see extended note to *Sparhawk v. City of Salem*, 79 Id. 703, 704; note to *Jones v. Inhabitants of Waltham*, 50 Id. 784.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The principal case was approved and followed in *Fogg v. Nahant*, 106 Mass. 280; S. C., 98 Id. 581; *Stone v. Inhabitants of Hubbardston*, 100 Id. 55; *Horton v. City of Taunton*, 97 Id. 267, note; *Babeon v. Inhabitants of Rockport*, 101 Id. 98; *Houfe v. Town of Fulton*, 29 Wis. 306; *City of Greencastle v. Martin*, 74 Ind. 458. But while a town is not liable for injuries caused by unmanageable and runaway horses, in conjunction with defects in the highway, unless it appears that the injury would have occurred if the horses had not run away or become unmanageable, yet a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver: *Houfe v. Town of Fulton*, 29 Wis. 307; *Cushing v. Bedford*, 125 Mass. 529. But the fact that a horse was frightened and not under the control of any one, at a time when it was struck by a railroad train on a highway crossing, is not conclusive as matter of law of such a want of care on the part of its owner as to defeat an action brought by him against the railroad corporation to recover for the injury as caused by their negligence: *Southworth v. Old Colony etc. R'y Co.*, 105 Id. 344. The principal case was considered not to have any material influence upon the decision, in *City of Crawfordville v. Smith*, 79 Ind. 309, for the reason that the principal case rested upon peculiar statutory provisions.

WINCHESTER v. HOWARD.

[97 MASSACHUSETTS, 303.]

AGENT MAY SELL PROPERTY OF HIS PRINCIPAL WITHOUT DISCLOSING FACT THAT HE ACTS AS AGENT, or that the property is not his own, and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal.

EVERY MAN HAS RIGHT TO ELECT WHAT PARTIES HE WILL DEAL WITH. QUESTIONS AS TO CONTRACT SHOULD BE LEFT TO JURY WHEN. — S., being W.'s agent to sell a pair of oxen, concealed his agency in attempting to sell them to H., and in answer to H.'s inquiries, made representations tending to induce H. to believe that they were the property of S. himself, and not of W., with whom H. would not have knowingly contracted, for private reasons, and agreed "that H. might drive them home, and that he would give H. a bill of sale of them the next day, or that H. might drive them back if he did not then find things as S. had told him." H. drove them home, and discovering the same evening that W. claimed to own them, and that they had never been the property of S., for that reason drove them back the next morning, and refused to take a bill of sale either in S.'s or W.'s name. In an action by W. against H. for the price of the oxen, it was held that it should have been left to the jury to determine whether the minds of the parties really met, and if so, what the contract was; further, that upon the whole evidence in this case they would be justified in finding a verdict for the defendant.

CONTRACT for the price of a pair of oxen alleged to have been purchased by the defendant of the plaintiffs, Winchester and another. Defendant denied the purchase. Plaintiffs in-

roduced evidence tending to show that through one Smith, their agent, they sold the cattle to defendant. Defendant offered to prove certain facts, which he contended would establish his defense; but the court ruled that, if proved, they would constitute no defense to the action, and directed a verdict for the plaintiffs. Most of defendant's evidence offered, as embodied in his bill of exceptions, allowed by the judge, appears in the opinion. Howard contended that he had a right to return the cattle as he did. Smith declined to receive them, and offered to give the defendant a bill of sale of them in the name of the plaintiffs, or a bill in his own name, both of which offers the defendant rejected, insisting upon his right to return the cattle, over which, after such return, neither party exercised rights of ownership. Defendant offered evidence tending to show that for some years previous he had had no dealings with the plaintiffs; that he would not knowingly deal with them; that he did not suppose he was contracting with them; and that no consideration was paid by the defendant, or any steps taken to complete the contract, except as above set forth.

G. A. Torrey, for the defendant.

G. F. Hoar, for the plaintiffs.

By Court, CHAPMAN, J. The court are of opinion that it should have been left to the jury in this case to determine whether the minds of the parties really met upon any contract; and if so, what the contract was.

It is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal: *Huntington v. Knox*, 7 Cush. 371. But on the other hand, every man has a right to elect what parties he will deal with. As was remarked by Lord Denman in *Humble v. Hunter*, 12 Q. B. 311: "You have a right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract." There may be good reasons why one should be unwilling to buy a pair of oxen that had been owned or used or were claimed by a particular person, or why he should be unwilling to have any dealings with that person; and as a man's right to refuse to

enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury.

In this case it appears that Smith, the plaintiff's agent, told the defendant that he had a pair of oxen for sale (referring to the oxen in question), and that another pair belonging to one Blanchard were in his possession, which pair he was authorized to sell. A jury might properly find that this amounted to a representation that the oxen in question were his own. The defendant then made inquiries; in answer to which Smith affirmed that the oxen had never been hurt; that the plaintiffs had no mortgage upon them, and that there was no claim upon them, except the claim which Smith had. A jury might properly find that this was, in substance, a representation that the title to the oxen was exclusively in Smith; and that, as the defendant was unwilling to deal with the plaintiffs, he made proper inquiries on the subject, and was led by Smith to believe he was not dealing with the plaintiffs. The defendant took the cattle home, with an agreement that he might return them "if he did not find things as Smith had told him." In the course of the evening he was informed that the cattle belonged to the plaintiffs, and being unwilling to buy oxen of them, he returned them to Smith the next morning before any bill of sale had been made. The jury would be authorized to find that he returned them within the terms of the condition upon which he took them, because he did not find things as Smith had told him. It is thus apparent that upon the whole evidence they would be justified in finding a verdict for the defendant.

Exceptions sustained.

AS TO FIRST POINT IN SYLLABUS, *supra*, see note to *Hunter v. Giddings*, ante, p. 57. For citations of principal case, see *Boston Ice Co. v. Potter*, 123 Mass. 30; *Pond v. Harris*, 113 Id. 120.

SOUTHWICK v. SOUTHWICK.

[97 MASSACHUSETTS, 827.]

DESERTION IS STATUTORY GROUND FOR DIVORCE.

WORD "DESERTION" IN STATUTE AUTHORIZING DIVORCE FOR THAT CAUSE DOES NOT SIGNIFY merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract.

LIBEL BY HUSBAND FOR DIVORCE FROM BOND OF MATRIMONY ON GROUND OF DESERTION CANNOT BE SUPPORTED from the mere fact that his wife has refused for five consecutive years to have sexual intercourse with him, although such refusal might be unjustified by considerations of health or physical disability.

LIBEL for divorce from bond of matrimony on ground of alleged desertion. It was filed in 1867. The parties were married in 1844, and lived together. They had five children, the youngest of whom at the time of this libel was fifteen years old. In July, 1861, the wife took offense because the husband allowed their eldest son to enlist in the army, withdrew from the bedroom which she and her husband had previously occupied together, and from that time occupied at night a separate bedroom, from which she constantly excluded her husband. Her manner toward him in the household was thenceforward unkind. They lived in the same house until 1864, when their house was burned. The husband then provided a temporary tenement for his family, in which the wife occupied a bedroom, from which, as before, she constantly excluded him, until, in 1865, she left him without his knowledge or consent, and took the children with her. From that time she lived separate from him. The husband testified that by reason of his wife's persistent refusal, he had no sexual intercourse with her after July, 1861. No considerations of health or physical disability appeared to justify her refusal; but by her declarations to him and to others, it appeared to be willful, she declaring that she "had left Mr. Southwick's bed and gone up-stairs to sleep"; that she "didn't intend to have any more boys for Mr. Southwick to send to the war"; that she "had no love for him"; that she "didn't think she should live with him again as man and wife"; that she "didn't feel as if she wanted to live with him"; and that "he was nothing but a boarder." It appeared, however, that he had supported her and the family until she finally left him in 1865.

G. F. Verry, for the libelant.

G. F. Hoar, for the libelee.

By Court, BIGELOW, C. J. The evidence in this case does not entitle the libelant to a decree of divorce from the bond of matrimony on the ground alleged in the libel. The word "desertion" in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it

imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract. In the first statute enacted, by which desertion was made a cause of divorce from the bond of matrimony in this commonwealth (Stats. 1838, c. 126), it was expressly provided that the guilty party should have "utterly deserted" the other. In the subsequent statutes on the same subject (Stats. 1857, c. 228, sec. 2, and Gen. Stats., c. 107, sec. 7), the phraseology is altered, but not with an intention to change the degree or kind of desertion which should be deemed an adequate ground of divorce: *Lea v. Lea*, 8 Allen, 418. If such had been the purpose of the legislature, we think it would have been so expressed in terms, and not left to implication.

In England, a suit for the restitution of conjugal rights cannot be maintained on the ground of a total and absolute refusal of matrimonial intercourse. A cessation of cohabitation must be shown to warrant a decree: *Orme v. Orme*, 2 Add. Ecc. 382; *Forster v. Forster*, 1 Hagg. Const. 144, 154. Desertion in such proceedings is held to signify a refusal to live together. In this country, a suit for divorce on the ground of desertion is the remedy which has been substituted for the English process in like cases of a libel for restitution of conjugal rights; but the rules and principles which govern the proceedings are substantially alike in both classes of cases. We cannot doubt that the legislature, in providing that desertion should constitute a valid ground of divorce, intended to use the word in the same sense in which it had always been used in analogous proceedings in the English courts.

Libel dismissed.

DESERTION IS STATUTORY GROUND FOR DIVORCE: See extended note to *Hamaker v. Hamaker*, 65 Am. Dec. 708-726, on statutory cause for divorce. As to when desertion is ground for divorce, and when not, see collected cases in note to *Ingersoll v. Ingersoll*, 88 Id. 501; *Marsh v. Marsh*, 82 Id. 251. These cases also show what constitutes desertion.

THE PRINCIPAL CASE WAS SUMMARIZED in *Magrath v. Magrath*, 103 Mass. 579, and cited in *Cowles v. Cowles*, 112 Id. 298, where it was held that the utter denial of sexual intercourse on the part of the wife is not cruel and abusive treatment, entitling the husband to a divorce or annulment of marriage, under the statute. The cruelty charged must appear to be such "as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger."

CREHORE v. CREHORE.

[97 MASSACHUSETTS, 230.]

MAN CANNOT AVOID MARRIAGE CONTRACT ON GROUND THAT WOMAN FRAUDULENTLY REPRESENTED HERSELF TO HIM AS CHASTE, and thereby induced him to marry her, where he knew that she was unchaste before entering into the marriage contract with her.

LIBEL for sentence of nullity of marriage, setting forth that the libelee, being then a widow, fraudulently represented herself to the libelant as chaste, and thereby induced him to marry her at a time when she was pregnant with a bastard child. Libelant testified that he first saw and conversed with her on the railroad cars in September, 1865; that he first "became acquainted" with her on March 2, 1866, at a house on Dover Street in Boston; that something was then said about marriage; that she went to Fitchburg the next day, and staid there eight or nine days, during which time the agreement for the marriage was made; that he had sexual intercourse with her during this month of March; that the night before their marriage she told him she thought she was in a family way; that the next morning he went into her room before she was up, and said that if what she had told him the night before was true, he would not marry her, as the child could not be his, but she replied it was only her nonsense, and there was no truth in it; that he married her on faith in this reply; that in about three weeks he began to suspect that "all was not right"; that in about five weeks after their marriage he ascertained her pregnancy, and turned her away; and that he had not seen her since that time. From medical and other testimony, it appeared that in August, 1866, the libelee, after the full period of a nine months' pregnancy, was delivered of a dead child. It also appeared that the libelant was not its father, and that the deceased husband of the libelee could not have been its father. The question was, Did these facts warrant a sentence of nullity of the marriage?

G. A. Torrey, for the libelant.

No counsel appeared for the libelee.

By the COURT. The facts show that the libelant had full knowledge that the libelee was unchaste before he entered into the marriage contract, and was thereby put on his guard, so that he cannot allege that he was induced to contract the marriage by such fraud and deceit on the part of the libelee

as will enable him to avoid the contract: *Foss v. Foss*, 12 Allen, 26.

Libel dismissed.

CONCEALMENT BY WOMAN BEFORE MARRIAGE OF HER PREVIOUSLY UN-CHASTE CHARACTER, or representations falsely made by her inducing the other party to believe her chaste, are not such a fraud as will support a judgment declaring a marriage void: *Varney v. Varney*, 52 Wis. 126, citing the principal case.

SIMMONS v. NEW BEDFORD, VINEYARD, AND NANTUCKET STEAMBOAT COMPANY.

[97 MASSACHUSETTS, 361.]

CARRIER OF PASSENGERS FOR HIRE IS NOT, LIKE COMMON CARRIER OF GOODS, INSURER against everything but the act of God and public enemies. He is not held to take every possible precaution against danger; but he is bound to use the utmost care which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient, and suitable vehicles or vessels, and other necessary or appropriate instruments and means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur.

COMMON CARRIER'S COMPLIANCE WITH POSITIVE STATUTE REGULATIONS DOES NOT EXEMPT HIM from responsibility for neglect to observe all other reasonable precautions against danger.

IF COMMON CARRIER FAILS IN HIS DUTY, HE IS RESPONSIBLE FOR CONSEQUENCES OF HIS NEGLIGENCE, although the negligence or misconduct of a third party contributes to the injury. He is as much bound to guard against the results of the acts of third parties as of any other cause, the operation of which he can reasonably anticipate.

OWNERS OF STEAMBOAT MANAGED AND NAVIGATED BY THEIR SERVANTS FOR CARRIAGE OF PASSENGERS FOR HIRE, on the side of which hangs a small boat suspended over a part of a deck where it is proper for passengers to be, are bound to use the utmost care, consistent with the nature and extent of their business, to keep this boat so secured as to guard against injury by its falling upon any passenger from any cause, including careless or irregular acts of other passengers, which may reasonably be anticipated.

CIRCUMSTANCES SHOWING WHEN "DUE CARE" IS QUESTION OF FACT. — Upon the trial of an action brought by a passenger for an injury sustained by the fall upon him of a small boat suspended over the main deck of a steamboat, the question whether he was in the exercise of due care in taking his position in a place assigned for the use of passengers, under the small boat, at a time when he saw two persons in it, and in continuing to stand there, without attempting to move away, while he saw two or three other persons enter it; and the question as to whether the defendants took the proper precautions in securing the larboard boat, or

preventing passengers from standing under it or getting into it, are questions of fact for the jury.

PLAINTIFF IN NEGLIGENCE CANNOT RECOVER IF HE WAS HIMSELF NEGLIGENT.

CONFLICTING EVIDENCE AS TO NEGLIGENCE SHOULD BE SUBMITTED TO JURY. ADMISSIBLE AND INADMISSIBLE EVIDENCE IN ACTION OF TORT FOR INJURY SUSTAINED BY PLAINTIFF WHILE PASSENGER ON BOARD DEFENDANTS' STEAMBOAT. — Where the injury complained of in such action was sustained by the fall upon the plaintiff of a small boat, which was suspended over the main deck on the larboard side of the defendants' steamboat, and which fell at a time when four or five persons were in it and another was trying to get into it, the opinion of a witness at the trial, whether it was not manifestly to the discernment of passengers of common understanding an inappropriate place for passengers to be in, was held inadmissible in evidence. But evidence that passengers had been in the habit of sitting in it so frequently before the accident that the officers of the steamboat must have known of such habit was held admissible; though such evidence would not necessarily show that they had any reason to suppose that such occupation would be dangerous.

EVIDENCE OF DISREGARD BY PASSENGERS OF STEAMBOAT RULES AS TO STARBOARD BOAT, rails, or hurricane deck has no tendency to show either a license, permission, or custom affecting the larboard boat, or that there was danger of its being abusively or otherwise irregularly used by passengers, or in a manner dangerous to other passengers; such evidence is incompetent as to the use of the larboard boat, and the jury should be instructed to this effect, where such evidence has been received in an action against the steamboat company, by a passenger who has been injured by the fall of the larboard boat upon him.

TORT for injuries sustained by the plaintiff while a passenger on board the defendants' steamboat. It appeared that plaintiff had paid for his ticket, and had taken passage on the boat to attend a camp-meeting. The boat was crowded, having from one to two thousand passengers on board, and was managed and navigated by the defendants' servants. Shortly after the boat started on its voyage, the plaintiff took his position on the main deck, at a place where, it was not denied, it was proper for passengers to be, and over which was hung, on davits, the larboard small boat, about fifteen feet long, weighing 225 pounds, and suspended by tackle and falls, which were made fast at each end of this boat by a hook to a ring attached to a bolt about three quarters of an inch in diameter, and driven into the wood-work. This boat was hung on this part of the steamboat for convenience of lowering in case a passenger should fall overboard, and was so placed by direction of the United States steamboat inspector, whose testimony, confirmed by that of an experienced steamboat captain, tended to show that the bolts were strong enough to

sustain the weight of the boat and the weight of ten or twelve persons besides. There was also evidence in behalf of the defendants that the bolts were of suitable composite metal, incapable of rusting, and that the stern bolt was without flaw or blemish; but two of the plaintiff's witnesses testified that the metal of this bolt was corroded, one of them saying that he thought it was iron, and rusted. The plaintiff testified that when he moved to his position above mentioned he saw two persons in the small boat, and that afterwards, while he was standing under it, he saw two or three other persons enter it. About fifteen minutes after the voyage began, the stern bolt broke, and the boat fell, as another person was getting into it; and in falling it struck the plaintiff on the head, and injured him seriously. There was testimony tending to show that before it fell it had been swung and rocked by the persons in it; and one witness testified that he moved from under it for that reason, and saw several other persons also moving from under it. It appeared that another boat, somewhat larger in size, was hung on the starboard side of the steamboat; and that it was one of the rules of the steamboat that passengers should not "ride" in either of the small boats, or outside the rails, or on the hurricane deck, and that the officers were directed to enforce this rule. The plaintiff offered evidence to show that it was not enforced, and that passengers, before the day of the accident, had been allowed to ride on the hurricane deck, outside the rails, and in the starboard boat, with the knowledge and permission of the officers. Defendants objected, but the evidence was admitted. Other facts are sufficiently stated in the opinion.

J. C. Stone and W. W. Crapo, for the defendants.

G. F. Hoar and P. E. Aldrich, for the plaintiff.

By Court, GRAY, J. This is an action of tort to recover damages for injuries sustained by the plaintiff while a passenger on a steamboat belonging to the defendants, and managed and navigated by their servants, from the falling upon his head of a small boat hung on the larboard side and over the lower deck of the steamboat, through the alleged negligence of the defendants and their servants in the manner of hanging this small boat, and in not preventing other passengers from getting into it.

The general principles of law by which the liability of the defendants is to be tested are well settled. A carrier of pas-

sengers for hire is not, like a common carrier of goods, an insurer against everything but the act of God and public enemies. He is not held to take every possible precaution against danger; for to require that would make him an insurer to the same extent as a carrier of goods, and might oblige him to adopt a course of conduct inconsistent with the economy and speed essential to the proper dispatch of his business. But he is bound to use the utmost care which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient, and suitable vehicles or vessels, and other necessary or appropriate instruments and means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur: *Farwell v. Boston and Worcester R. R. Co.*, 4 Met. 58, 59 [38 Am. Dec. 339]; *Ingalls v. Bills*, 9 Id. 15 [43 Am. Dec. 346]; *Shaw v. Boston and Worcester R. R. Co.*, 8 Gray, 59, 66; *Warren v. Fitchburg R. R. Co.*, 8 Allen, 233; *Le Barron v. East Boston Ferry Co.*, 11 Id. 315 [87 Am. Dec. 717]; *Stokes v. Eastern Counties R'y Co.*, 2 Fost. & F. 691; *Ford v. London and Southwestern R'y Co.*, 2 Id. 730; *Readhead v. Midland R'y Co.*, L. R. 2 Q. B. 412. Compliance with positive statute regulations does not exempt the carrier from responsibility for neglect to observe all other reasonable precautions: *Bradley v. Boston and Maine R. R. Co.*, 2 Cush. 539.

If the carrier fails in his duty, he is responsible for the consequences of his negligence, although the negligence or misconduct of a third party contributes to the injury: *Eaton v. Boston and Lowell R. R. Co.*, 11 Allen, 500 [87 Am. Dec. 730]. He is as much bound to guard against the results of the acts of third parties as of any other cause the operation which he can reasonably anticipate. Thus in *McElroy v. Nashua and Lowell R. R. Co.*, 4 Cush. 400 [50 Am. Dec. 794], the proprietors of a railroad were held liable for the careless management of a switch forming part of their road, by the servant of another corporation owning a connecting road, because, in the words of Chief Justice Shaw, "as passenger carriers, the defendants were bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all the subsidiary

arrangements necessary to the safety of passengers." So in *Pittsburg, Fort Wayne, and Chicago R'y Co. v. Hinds*, 53 Pa. St. 512, a mob of drunken men forced themselves into the ladies' car while stopping at a station, and after the train had moved on, began to fight with one another, and in so doing injured a female passenger; and it was held that the railroad corporation was responsible for the injury if the conductor had not done all that he could to stop the fighting; but was not so responsible merely by reason of the drunken passengers having been permitted to get into the car, because it appeared that the conductor and other servants of the corporation could not have kept them off, and the corporation, although bound to furnish men enough for the ordinary demands of transportation, was bound to anticipate or provide for such an extraordinary occurrence.

In the present case, the defendants were bound to see that their officers, agents, and servants used the utmost care and diligence in keeping the steamboat constantly provided with suitable machinery, boats, and appurtenances, and competent officers and crew in controlling and managing the use of the vessel and appurtenances, and in making all the arrangements necessary to secure the passengers against any danger which might reasonably be anticipated from the action of the winds and seas, of the officers and crew, or of other passengers. They were not indeed responsible for the negligent or wrongful acts of the passengers to the same extent as for those of their own officers and crew. But they had the power to make reasonable regulations as to the places which passengers might occupy, and as to their conduct while on board. And they were bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers.

As to the larboard boat, the fact that it was hung in the place in which it was by order of the government inspector did not protect the defendants from responsibility for negligence in the manner of hanging or using it. They were still bound to use the utmost skill and care, consistent with the nature and extent of their business, in so keeping it secured and preventing passengers from getting into it, as to guard against injury by its falling upon a passenger from any cause, including careless or irregular acts of other passengers which might reasonably be anticipated. Whether the defendants

failed in the degree of diligence required of them by law, either in not sufficiently securing the larboard boat or in not taking measures to prevent passengers from standing under it or getting into it, and how far the defendants had reason to expect that passengers would get into it in such numbers and conduct themselves there in such a manner as to endanger persons standing under it, were questions of fact. The final instructions given to the jury, at the request of the plaintiff's counsel, clearly and accurately expressed the legal measure of the defendants' liability.

It was argued for the defendants that the evidence showed that they had exercised the requisite degree of care, by hanging the larboard boat in as inaccessible a place as was consistent with readily lowering it in case any of the passengers or crew should fall overboard, by providing it with tackle, bolts, and fastenings of the best quality, and of sufficient strength to bear the weight of as many persons as it would accommodate, by guarding it with a rail around the promenade deck, and by establishing rules prohibiting passengers from going into the boat or outside the rail. But whether the defendants had in these or other respects omitted any precautions which might reasonably be required of them was a question of fact. It does not appear by the bill of exceptions that all the testimony is reported, or that the objection, taken at the argument, that all the evidence introduced was insufficient to warrant the jury in finding that the defendants had been negligent in any particular, was made at the trial. Upon the case as now presented, no opinion can therefore be properly expressed by this court upon that question.

If the plaintiff himself was wanting in ordinary care, and without such negligence on his part would not have been injured, even if the defendants were also negligent, he certainly cannot recover. But upon the question of his negligence the evidence was conflicting, and that question was properly submitted to the jury.

The question put by the defendants to one of the witnesses, whether in his judgment the larboard boat was not manifestly to the discernment of passengers of common understanding an inappropriate place for passengers to be in, was rightly excluded, as asking for an opinion upon a subject which did not require any peculiar skill or experience to judge of, and which, so far as it was material, was to be passed upon by the jury:

Perkins v. Augusta Insurance and Banking Co., 10 Gray, 312 [71 Am. Dec. 654].

Evidence that passengers had been in the habit of sitting in the larboard boat so frequently, and during such a period of time before the accident, that the officers of the steamboat must have known of it, was admissible as tending to show their knowledge of that fact, and therefore competent upon the question whether they took proper precautions to prevent any danger which might reasonably be anticipated from such occupation. It would not, however, necessarily show that they had any reason to suppose that such occupation would be dangerous.

But evidence of the disregard by passengers of the rules of the steamboat in going outside of the rails in other parts of the vessel, into the starboard boat, or upon the hurricane deck, had no tendency to show a use of the larboard boat by the permission or with the knowledge of the officers in a manner dangerous to other passengers. The starboard boat was nearer to the railing, and more firmly supported, than the larboard boat, and evidence as to the use of the one had no legitimate bearing upon the question of the use of the other. If the case had been left as it originally stood upon the admission of evidence of the use of both boats and the hurricane deck, it might be doubtful whether the incompetent evidence had been so distinctly objected to at the time of its admission as to entitle the defendants to a new trial. But it further appears that on the subsequent motion of the defendants, the presiding judge refused either to strike out the incompetent evidence or to instruct the jury to disregard it, or even to instruct them that the fact of passengers having disregarded the rules of the steamer in respect to the starboard boat, the rails, or the hurricane deck, had no tendency to show either any license, permission, or custom affecting the larboard boat, or any danger of that boat's being improperly used by passengers. This refusal was clearly erroneous, and for this reason the exceptions must be sustained.

Having already stated the general rules of law applicable to the case, it does not seem to us to be necessary or useful to examine in detail the other instructions given or requested.

Exceptions sustained.

COMMON CARRIER OF PASSENGERS IS NOT INSURER AGAINST ALL ACCIDENTS: *Sawyer v. Hannibal etc. R. R. Co.*, 90 Am. Dec. 382; *Huelenkamp v. Ottumwa R'y Co.*, 90 Id. 389; note to *Deyo v. New York Cent. R. R. Co.*, 88 Id.

427; but a carrier of goods is an insurer against all but the act of God and public enemies: *Arnold v. Jones*, 82 Id. 617; *Hooper v. Wells, Fargo, & Co.*, 85 Id. 211; *Merritt v. Earle*, 86 Id. 292.

PRECAUTIONS REQUIRED OF PASSENGER CARRIERS: See *Huelsenkamp v. Citizen's R'y Co.*, 90 Am. Dec. 399; *Johnson v. Winona etc. R. R. Co.*, 88 Id. 83, note 88; note to *Deyo v. New York Cent. R. R. Co.*, 88 Id. 427; *State v. Baltimore etc. R. R. Co.*, 87 Id. 600.

"DUE CARE" IS QUESTION OF FACT, WHEN: See *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700, note 706; *Stevens v. Inhabitants of Boxford*, 87 Id. 616, note 618, containing collected cases; *Fox v. Sackett*, 87 Id. 682.

PLAINTIFF IN ACTION FOR NEGLIGENCE CANNOT RECOVER IF HE WAS HIMSELF NEGLIGENT: *Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 49; *North Pennsylvania R. R. Co. v. Helleman*, 88 Id. 482; note to *Donaldson v. Mississippi etc. R. R. Co.*, 87 Id. 400.

CONFLICTING EVIDENCE AS TO NEGLIGENCE SHOULD BE SUBMITTED TO JURY: See note to *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 786; *Johnson v. Winona etc. R. R. Co.*, 88 Id. 83; *Louisville etc. R. R. Co. v. Collins*, 87 Id. 486; *Snow v. Housatonic R. R. Co.*, 85 Id. 720.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It does not exonerate a common carrier of passengers from the consequences of failure in the performance of his duty, if such failure contributed to the injury, to show that if others for whom he is not responsible had performed their duty the injury would not have occurred, or that it might have been avoided by care and diligence on the part of those who were clearly the fellow-servants of the plaintiff in the transaction: *Elmer v. Locke*, 135 Mass. 576. A railroad company must use the utmost care consistent with the nature and extent of its business in providing a proper switch; but it is not responsible for hidden defects which could not have been discovered by the most careful inspection: *Ladd v. New Bedford R. R. Co.*, 119 Id. 413. An expert witness may explain all facilities and appliances of machinery for avoiding or diminishing danger in its use, as of a steam-engine; but it is for the jury, and not for him, to draw conclusions from the circumstances so detailed: *Buxton v. Somerset Potters' Works*, 121 Id. 448. The principal case again came before the court in *Simmons v. New Bedford etc. Steamboat Co.*, 100 Id. 34; was cited in *Bryant v. Rich*, 106 Id. 189; and its instructions were in accordance with those given in *Commonwealth v. Coburn*, 132 Id. 563.

CRANSTON v. CRANE.

[97 MASSACHUSETTS, 459.]

TO EFFECT VALID SALE UNDER POWER, all the directions of the power must be complied with.

WHEN POWER OF SALE MERELY AUTHORIZES DONEE TO EXECUTE DEED IN NAME OF DONOR, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power, and not of the donee.

POWER OF SALE MAY BE GIVEN TO BE EXECUTED BY DEED OF DONEE; and when such is the case, the deed of sale not only may but must be executed under the hand and seal of the donee of the power.

POWER OF SALE MAY BE GIVEN IN ALTERNATIVE; and when such is the case, the deed of sale may be executed either by the donor or donee of the power.

POWER OF SALE IN MORTGAGE OF REAL ESTATE WHICH AUTHORIZES MORTGAGEE "to make, execute, and deliver to the purchaser all necessary conveyances for the purpose of vesting in him the premises sold in fee-simple absolute," may be executed by the deed of the mortgagee, reciting the power, and signed and sealed with his own name and seal; and if the mortgagee is a married woman, it is not necessary for her husband to join in the conveyance, or consent thereto in writing: See Mass. Gen. Stats. 1860, c. 108, sec. 3.

EXECUTION OF POWER OF SALE IN MORTGAGE OF REAL ESTATE — ENTRY BY MORTGAGEE UNNECESSARY WHEN — ACTS WHICH MORTGAGEE MAY EXECUTE THROUGH OTHERS. — Power of sale in mortgage of real estate, which provides that on breach of the condition "it shall be lawful for the mortgagee to enter into and upon the premises, and sell and dispose of the same, and all benefit and equity of redemption of the mortgagor therein, at public auction, such sale to be upon the premises granted, first giving notice of the time and place of sale," may be lawfully executed without the mortgagee entering upon the premises at any other time or in any other manner than at the time of the sale and for the purposes thereof; and the entry upon the premises, the giving of the notice, and the conduct of the sale are acts which the mortgagee may execute, and whose authority therefor need not be under seal or in writing.

UPON BREACH OF CONDITION IN MORTGAGE OF REAL ESTATE CONTAINING POWER TO SELL, the right to sell attaches at once.

FORECLOSURE OF MORTGAGE OF REAL ESTATE CONTAINING POWER TO SELL IS MADE COMPLETE BY SALE.

REDEMPTION AFTER BREACH OF CONDITION IN MORTGAGE IS EQUITABLE RIGHT. No remedy is given at law; and it must be enforced as authorized by statute, by a suit in equity.

POWER TO SELL CONTAINED IN MORTGAGE OF REAL ESTATE is a power coupled with an interest, and cannot be revoked.

TENDER, AFTER BREACH OF CONDITION IN MORTGAGE OF REAL ESTATE CONTAINING POWER TO SELL, IS MERELY FOUNDATION for the equitable remedy of a suit to redeem. If a tender be made and not accepted, the mortgagor may recover the premises by a suit in equity for redemption. This applies to a tender made before as well as after an entry for breach of the condition. If not accepted, it has no effect upon the legal estate. It does not prevent nor delay foreclosure, unless a suit to redeem is brought within a year afterwards. The effect of the breach is not removed by a tender alone, but by the suit in equity to redeem which follows such tender; and a sale under the power, so far as it operates to transfer the legal title and possession, cannot be defeated by the tender.

IN SOME CASES, COURT WILL RELIEVE AGAINST FORFEITURE OF ESTATE, IN SUIT AT LAW TO ENFORCE FORFEITURE AFTER BREACH, by ordering a stay of proceedings upon full performance. The conditional judgment in an action to foreclose a mortgage is of this nature, though it is now secured to the party by statute. But when the parties have provided another mode, by which a foreclosure may be effected without the necessity of such a suit, no such relief can be given.

DEFENSE TO WRIT OF ENTRY IS INSUFFICIENT WHEN. — WHERE MORTGAGED REAL ESTATE IS SOLD AND CONVEYED to the purchaser under a power of sale contained in the mortgage, which authorized the mortgagee, upon breach of the condition, "to sell the premises, and all benefit and equity of redemption of the mortgagor therein," "and to execute and deliver all necessary conveyances for the purpose of vesting in the purchaser the premises sold, in fee-simple absolute"; and if the mortgagor has not obtained a decree in equity to restore him to the legal right of possession which he forfeited by breach of the condition in failing to pay interest on the stipulated day, — it is no defense to a writ of entry brought against the mortgagor by such purchaser for possession of the premises that he purchased the same with notice that after the breach, but before the sale, the mortgagor tendered to the mortgagee the amount of the interest in default, with interest thereon to the date of the tender, and with full compensation for all expenses and trouble incurred in preparing to execute the power of sale.

WRIT of entry. *Plea, nul disseisin.* There was a judgment for the tenant, Crane, and the case came before the court on an agreed statement of facts, the material parts of which were as follows: On June 1, 1864, the tenant, Crane, being seised and possessed of the demanded premises, executed a deed of mortgage, with power of sale of them, for five thousand dollars, payable in five years, with interest payable semi-annually, to Irene G. Cranston, wife of B. Cranston. His deed provided that, on breach of the condition of paying either principal or interest, it should be lawful for the mortgagee to enter into and upon the premises and sell and dispose of the same, and all benefit and equity of redemption of the mortgagor therein, at public auction, such sale to be upon the premises granted, first giving notice of the time and place of sale. It also authorized the mortgagee to make, execute, and deliver to the purchaser all necessary conveyances for the purpose of vesting in him the premises sold, in fee-simple absolute; and out of the purchase-money to pay all expenses of said sale, and principal and interest; and to pay over the residue to the mortgagor. Such sale was therein declared to be a perpetual bar, both in law and equity, against the mortgagor, etc. The deed also provided that, until default, it should be lawful for the mortgagor to hold and enjoy said premises, and receive the rents and profits thereof. On June 1, 1866, the mortgagor failed to pay the interest then due, and the condition of the mortgage was then broken. The mortgagee gave notice that the premises would be sold at public auction on July 31, 1866, at two o'clock, P. M., on the premises. A short time previous to that hour on that day, an agent of

the mortgagor offered to pay the interest which was in default, with interest upon such interest from the time it became due, and to pay for all expenses and trouble in relation to the sale, said offer being made to B. Cranston, the husband of the mortgagee, whom she had authorized orally, but not in writing, to represent her at the sale, and who was there acting in her behalf. Cranston refused to accept this offer, and claimed the entire mortgage debt, and contended that the breach could not be remedied, and that it was at the option of the mortgagee whether it should be cured. At the sale the agent affirmed his readiness to pay all the interest, and for all cost and trouble. The premises were sold, those present being informed that Cranston contended that there was a breach, and that he had a right to sell; and that the agent contended that such a tender as he had made cured the breach. The premises were sold to the plaintiff, George K. Cranston, the demandant in this action, for \$5,350. No other entry was made on the premises by the mortgagee, except by the entry of her husband thereon at the time and for the purpose of the sale. On August 28th the mortgagee received from George K. Cranston the full amount of the purchase-money; and on receipt thereof the mortgagee executed and delivered to him, in her own name and by her own signature and seal, and without the written consent of her husband or his joining therein, the deed of the premises, by virtue of which he claimed title thereto in this action. Her deed set forth the provisions of the mortgage, and particularly recited the provisions of the power of sale. Her affidavit setting forth her acts in reference to the sale, together with a copy of the notice of the sale, was on the following day filed in the office of the registry of deeds. The tenant continued in possession of the premises, claiming an estate of freehold therein, notwithstanding the sale and the subsequent proceedings; and it was agreed that in the event of a final judgment against him, the case should be sent to an auditor to determine the amount of rents and profits received by him since his disseisin of the demandant.

T. L. Wakefield, for the demandant.

W. Colburn, for the tenant.

By Court, WELLS, J. Several objections are made to the sufficiency of the proceedings by which the power of sale contained in the mortgage from the defendant to Irene G. Cran-

ston was executed by the mortgagee. To effect a valid sale under a power, all the directions of the power must be complied with.

The principal objection in this case is, that the donee of the power executed the deed to the purchaser by her own signature and seal. When the power merely authorizes the donee to execute a deed in the name of the donor, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power, and not of the donee. But a power may be given to be executed by the deed of the donee as well as it may by his will. This was formerly the more common mode: 1 Sugden on Powers, 7th ed., 286. When such is the case, the deed of sale not only may but must be executed under the hand and seal of the donee of the power. If the power be given in the alternative, as is often the case, the deed of sale may be executed in either form. In the present case the power is "to make, execute, and deliver to the purchaser or purchasers thereof all necessary conveyances for the purpose of vesting in such purchaser or purchasers the premises so sold, in fee simple absolute." This is not a mere power of attorney to execute a deed in the name of the mortgagor; though the deed might not perhaps have been invalid if it had been executed in that manner; but it is a full power of sale and conveyance, which may properly be executed, as it was in this case, by the deed of the mortgagee, reciting the power, and signed and sealed with her own name and proper seal. No share in the authority to be exercised, and no interest in the estate under such a mortgage and power, vests in the husband. She does not require his signature nor his assent to enable her to execute the power or to part with her rights under the mortgage. It is not her real property that is conveyed: *Heath v. Withington*, 6 Cush. 497; 4 Kent's Com., 6th ed., 325. The entry authorized by the power is for the purpose of the sale only, and to enable the sale to be made upon the premises, as is required by the terms of the power. It is not necessary that such entry should precede the giving of the notices of sale; nor that it should be formally made at any other time or in any other manner than at the time of the sale, and for the purposes of the sale.

As the sale is required to be by public auction upon the premises, there is not the same degree of personal confidence implied in regard to the conduct of the proceedings as might otherwise be the case. We are of opinion that the giving of

the notices, the entry upon the land, and the conduct of the auction were all matters which the mortgagee might properly employ others to do under her direction; and that it did not require authority under seal for these purposes.

The remaining question is, whether the tender of the amount due and payable upon the mortgage operated to defeat the right to sell under the power, so that the purchaser could take no title. If made at the time stipulated in the condition of the mortgage, it would certainly have that effect, because no right to sell could arise until after a breach, and an attempt to sell would be a mere nullity. But upon a breach of condition the right to sell attached at once; and as it was a power coupled with an interest, it could not be revoked. Redemption after breach is an equitable right. No remedy is given at law. If a tender be made and not accepted, the mortgagor "may recover the premises by a suit in equity for redemption": Gen. Stats., c. 140, sec. 16. This applies to a tender made "before as well as after an entry for breach of the condition." The tender is merely the foundation for the equitable remedy. If not accepted, it has no effect upon the legal estate. It does not prevent nor delay foreclosure, unless a suit to redeem is brought within a year afterwards: Gen. Stats., c. 140, sec. 17. The effect of the breach is not removed by a tender alone, but by the suit in equity to redeem which follows such tender. The sale under the power, therefore, so far as it operated to transfer the legal title and possession, could not be defeated by the tender. If the mortgagor take the precaution to charge the purchaser with notice of the tender, he may preserve his right to redeem against him. But it is still only a right to redeem, and that an equitable right merely, to be enforced as authorized by statute, by a suit in equity. Unless and until he can obtain a decree in a court of equity, restoring him to the legal right of possession which he has forfeited, he can neither maintain nor defend a writ of entry against any one claiming under the mortgage. In some cases the court will relieve against the forfeiture of an estate, in a suit at law to enforce the forfeiture after breach, by ordering a stay of proceedings upon full performance. The conditional judgment in an action to foreclose a mortgage is of this nature; though it is now secured to the party by statute. But when the parties have provided another mode by which a foreclosure may be effected without the necessity of such a suit, no such relief can be afforded. The foreclosure is made complete by the sale. The purchaser

brings his writ of entry, not to enforce the forfeiture, for he has taken no conditional estate, but upon his absolute title acquired from and after the foreclosure.

The court are all of opinion that this defense cannot be maintained at law. The judgment for the defendant rendered in the superior court must therefore be set aside. The demandant being entitled to judgment for possession, the case must go to an assessor for the determination of the amount of rents and profits, in accordance with the agreement of the parties.

DIRECTIONS IN POWER OF SALE GIVEN IN MORTGAGE MUST BE STRICTLY PURSUED or the sale will be invalid: See *Sears v. Livermore*, 85 Am. Dec. 564, note 568; *Niles v. Ransford*, 51 Id. 95; *Carson v. Blakey*, 35 Id. 440.

NATURE OF MORTGAGOR'S EQUITY OF REDEMPTION, and of the mortgagee's right to a foreclosure, stated: *Goodenow v. Ewer*, 76 Am. Dec. 540. Redemption after breach of condition is an equitable right, and must be enforced as such: See note to *Beach v. Cooke*, 86 Id. 267; *McMillan v. Richards*, 70 Id. 655; *Chamberlain v. Thompson*, 26 Id. 390.

POWER TO SELL CONTAINED IN MORTGAGE IS POWER COUPLED WITH INTEREST, AND NOT REVOCABLE: See *Wilson v. Troup*, 14 Am. Dec. 458; note to *Thompson v. Garwood*, 31 Id. 508.

POWERS, HOW CONSTRUED AND EXECUTED: See *Wilson v. Troup*, 14 Am. Dec. 458; note to *Thompson v. Garwood*, 31 Id. 508; note to *Cassiday v. McKenzie*, 39 Id. 82.

TENDER OF MORTGAGE DEBT, EFFECT OF: See extended note to *Moynahan v. Moore*, 77 Am. Dec. 489; *Perre v. Castro*, 76 Id. 444, note 449; *Kortright v. Cady*, 78 Id. 145, and extended note thereto 155-160.

FORFEITURES, RELIEF IN EQUITY AGAINST: See extended note to *Smith v. Mariner*, 68 Am. Dec. 85-88.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where a grantor has given an absolute deed, and received a written agreement that the grantee will reconvey on the performance of a condition, performance of the condition of that agreement will not operate to revest the legal title in the grantor. There must be a reconveyance, and that can be enforced only in equity. Until the legal title is restored to the grantor or his assigns, the deed to his grantee gives the better title, which must prevail in law: *Wilson v. Black*, 104 Mass. 407. A deed or will of a married woman may be a valid execution of a power when it could not take effect as a deed or will: *Hall v. Bliss*, 118 Id. 559. Where a mortgage giving a power of sale authorizes the mortgagee, or any person for him, to execute a deed to the purchaser, either as the attorney of the mortgagor or in his own name, the deed may be executed in either form: Id. 560. When the entry authorized by a power of sale is for the purpose of the sale only, and to enable the sale to be made on the premises as required by the terms of the power, it is not necessary that it should be formally made at any other time or manner than at the time and for the purposes of the sale: *Foster v. Boston*, 433 Id. 148. By the terms of a power-of-sale mortgage of real estate, under the Massachusetts statutes, the right of the mortgagee or his assigns to sell

attaches at once upon default in the performance of its conditions; and as it is a power coupled with an interest, it cannot be revoked by the mortgagor: *Way v. Mullett*, 143 Id. 52. See also pages 53 and 57 of the same case, where the principal one is referred to.

TABER v. HAMLIN.

[97 MASSACHUSETTS, 489.]

MORTGAGE, WHAT CONSTITUTES. — BILL OF SALE OF PERSONAL PROPERTY INTENDED BY BOTH PARTIES AS SECURITY FOR MONEY LENT, and as instrument of defeasance executed as a part of the same transaction, by the terms of which, on payment of the note at maturity, the bill of sale is to be given up and surrendered, must be construed together, and as constituting a mortgage.

SUCCESSIVE RENEWALS OF NOTE SECURED BY MORTGAGE IS NOT PAYMENT OF MORTGAGE DEBT. The mortgage remains a valid and subsisting security; and the condition of the mortgage is broken when the note last given remains unpaid after its maturity.

REGISTRATION IS NOT NECESSARY TO VALIDITY OF MORTGAGE OF SHIP OR VESSEL, nor of goods at sea or abroad, if the mortgagee takes possession of them as soon as may be after their arrival in this state: See Mass. Gen. Stats. 1860, c. 151, sec. 2.

MORTGAGE OF PERSONAL PROPERTY AT COMMON LAW, PLEDGE EXCEPTED, SEEMS TO HAVE TRANSFERRED PROPERTY absolutely to mortgagee upon a breach of the condition. No process of foreclosure was necessary, and no right of redemption remained.

UNDER STATUTE OF MASSACHUSETTS, MORTGAGOR OF PERSONAL PROPERTY IS ALLOWED TO REDEEM at any time within sixty days after condition broken; and his right is not to be forfeited until sixty days after the mortgagee has given written notice of his intention to foreclose, and caused a copy of such notice to be recorded where the mortgage is recorded.

MORTGAGE NOT RECORDED, AND NOT REQUIRED TO BE RECORDED, IS TO BE FORECLOSED LIKE OTHER MORTGAGES, under the Massachusetts statutes, by sixty days' notice of the intention to do so, served as required by statute; but where the mortgage is valid without being recorded, the foreclosure notice is also valid without registration.

BILL in equity by the plaintiffs, Taber and another, assignees in insolvency of the copartnership of Jenney and Tripp, praying for an account from the respondent, Hamlin, of the amount received by him from the sale of one sixteenth of the whale-ship Lydia, and its outfits and catchings, and for the payment by him to the complainants of a balance alleged to be due after satisfying all his lawful demands against the insolvent firm. Respondent's answer alleged title in himself to the said property and its entire proceeds. The case was reserved for determination by the full court on the bill, answer, and an

agreed statement of facts, substantially as follows: On July 18, 1860, Jenney and Tripp borrowed from the respondent his promissory note for \$996.85, payable in four months to them or their order, and gave him as security a bill of sale, absolute in form, of one sixteenth of the Lydia, and its outfits and catchings, the ship being then absent on a whaling voyage. At the same time, and as part of the same transaction, the respondent signed and gave to them an instrument of defeasance, by the terms of which the bill of sale was to be surrendered to them in case said note was provided for by them at maturity. Jenney and Tripp caused the note to be discounted, and received its proceeds to their own use, and when it became due procured another note from the respondent, caused it to be discounted, and with its proceeds paid the first note, and repeated this process several times, the last note falling due March 25, 1862, which they failed to pay, and which was paid by the respondent. Nothing was said by either party about the bill of sale at any of these renewals. On the day that respondent paid this last note he signed and served on Jenney and Tripp a notice of his intention to foreclose the mortgage or bill of sale. This notice he caused to be recorded where the bill of sale was recorded, at the custom-house, but neither of them was ever recorded in the office of the town clerk. Jenney and Tripp went into insolvency in June, 1862, and the complainants were appointed assignees in July, 1862. The Lydia returned from her voyage on May 17, 1864, when the respondent took personal possession, as absolute owner, of the interest in the vessel and its outfits and catchings, which was covered by the bill of sale, and some months afterwards sold it, and received the proceeds. Afterwards the complainants, who at the time of their appointment as assignees were aware of all the facts above stated as occurring prior to that time, demanded from the respondent an account of the proceeds, and the payment of any balance over and above the amount of the indebtedness to him of Jenney and Tripp, alleging that he held said proceeds only as security for the note which he lent to the firm on July 18, 1860.

O. Prescott, for the complainants.

J. C. Stone, for the respondent.

By Court, FOSTER, J. A bill of sale of personal property intended by both parties as a security for money lent, and an instrument of defeasance executed as a part of the same

transaction, by the terms of which, on payment of the note at maturity, the bill of sale is to be given up and surrendered, must be construed together. And the two instruments constitute a mortgage, by all the authorities in this commonwealth: *Potter v. Boston Locomotive Works*, 12 Gray, 154; *Carpenter v. Snelling*, 12 Id. 452. The successive renewals of the notes secured by mortgage were not a payment of the mortgage debt. It therefore remained a valid and subsisting security; and the condition of the mortgage was broken when the note last given remained unpaid after its maturity.

Registration is not necessary to the validity of a mortgage of a ship or vessel, nor of goods at sea or abroad, if the mortgagee takes possession of them as soon as may be after their arrival in this state: Gen. Stats., c. 151, sec. 2.

The principal question in the present case is, whether the mortgage has been duly foreclosed. At common law, a mortgage, not a pledge, of personal property seems to have transferred the property absolutely to the mortgagee upon a breach of the condition. No process of foreclosure was necessary, and no right of redemption remained. Some authorities held that the mortgagor might maintain a bill in equity to redeem within a reasonable time after forfeiture; but this rule was neither clearly settled nor universally admitted, and has never been recognized in this commonwealth: See 2 Hilliard on Mortgages, c. 50, where the cases are collected. The first statute regulation of this subject is found in the revised statutes, chapter 107, section 40, by which the mortgagor of personal property is allowed to redeem at any time within sixty days after condition broken. By the statutes of 1843, chapter 72, section 1, the right of the mortgagor is not to be forfeited until sixty days after the mortgagee has given written notice of his intention to foreclose said mortgage for a breach of the condition thereof, and caused a copy of such notice to be recorded in the town clerk's office where the mortgage is recorded. The General Statutes, chapter 151, sections 4, 5, 6, and 7, continue in effect the same provisions. Section 7 provides that the notice, with an affidavit of service, shall be recorded wherever the mortgage is recorded. Section 8 enacts that "if the money to be paid or other thing to be done is not paid or performed or tender thereof made within sixty days after such notice is so recorded, the right to redeem shall be foreclosed."

What, then, is the mode of foreclosure where the mortgage is not, and is not required to be, recorded in any town or city

clerk's office? The plaintiff contends that by the letter of the statute there can be no foreclosure until sixty days after such a record of the notice. If this be so, then none of the statute provisions above recited apply to the present case. A recording of the foreclosure notice in a place where the mortgage is not required to be recorded would be wholly ineffectual, and not within the language of the act.

To hold that a mortgage valid without registration is incapable of foreclosure in any manner seems to us an inadmissible construction of provisions the object of which was to regulate rights of redemption and modes of foreclosure. If we were forced to conclude such to be the result of the legislation on the subject, we should probably hold that there could be redemption in equity only within a reasonable time, which by analogy would not exceed sixty days. We prefer, however, to give the statute system such an interpretation that it will embrace the foreclosure of mortgages not required to be, as well as those which must be, recorded. Accordingly we hold that such mortgages are to be foreclosed like others, by sixty days' notice of the intention to do so, served as required by the statute; but that in the cases where no registration is necessary, this exception applies to and includes the notices of foreclosure as well as the mortgages. Where the mortgage is valid without being recorded, the foreclosure notice also is sufficient without registration. This seems to us to be the fair result of the language, and the only rational interpretation of the meaning of the statute. Thus construed, its provisions make a complete and harmonious system.

It follows that the mortgage in the present case has been duly foreclosed, and this bill must be dismissed, with costs.

MORTGAGE, WHAT CONSTITUTES: *Koch v. Briggs*, 73 Am. Dec. 651. Deed with defeasance constitutes mortgage: *Friedley v. Hamilton*, 17 Id. 638; *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 42 Id. 240; *Hyndman v. Hyndman*, 46 Id. 171; extended note to *Chase's Case*, 17 Id. 300-306, on absolute deed and agreement to reconvey. Bill of sale and defeasance executed at the same time constitute a mortgage: *Stephens v. Sherrod*, 55 Id. 776; *Weathersly v. Weathersly*, 90 Id. 344.

MORTGAGE IS CONTINUING SECURITY, THOUGH NOTE IS RENEWED, OR FORM OF DEBT IS OTHERWISE CHANGED: See extended note to *Dwinnell v. Terstegege*, 85 Am. Dec. 467-471, where the subject is discussed; *Bank of Utica v. Finch*, 49 Id. 175.

MORTGAGE ON VESSEL AT SEA. — Possession of vessel must be taken as soon as practicable on her return to port: *Portland Bank v. Stubbs*, 4 Am. Dec. 151; *Badlam v. Tucker*, 11 Id. 202.

MORTGAGE OF PERSONALTY AT COMMON LAW, EFFECT OF: *Goodenow v. Beer*, 76 Am. Dec. 540; *Blystone v. Burgett*, 68 Id. 658. Mortgagee of personalty becomes absolute owner on condition broken, though the mortgagor may be entitled in equity to a redemption: *Lacey v. Giboney*, 88 Id. 145, note 148.

ENTRY OF MORTGAGEE INTO POSSESSION CANNOT ENLARGE HIS ESTATE: *Cunningham v. Hawkins*, 85 Am. Dec. 73, note 78; *Dutton v. Warschauer*, 82 Id. 765.

CHATTEL MORTGAGE IS GOOD, AS BETWEEN PARTIES TO IT, WITHOUT BEING RECORDED: *Fuller v. Paige*, 79 Am. Dec. 379, note 381; but invalid as against others: See note to *Bingham v. Jordan*, 79 Id. 750.

CHANDLER v. SIMMONS.

[97 MASSACHUSETTS, 508.]

DEED OBTAINED BY UNDUE INFLUENCE, THOUGH VOIDABLE ONLY BY PARTY WRONGED, MAY BE AVOIDED by a guardian afterwards appointed.

RIGHTS OF WARD ARE TO BE ASSERTED IN HIS OWN NAME; but upon the appointment of a guardian, all discretion as to their exercise is taken from the ward, and thenceforward intrusted to the guardian.

SPENDTHRIFT UNDER GUARDIANSHIP CANNOT EVEN MAKE ACKNOWLEDGMENT that will take his debt out of the statute of limitations; but his guardian may bind the ward's estate by such an acknowledgment.

MINOR HIMSELF CANNOT AFFIRM HIS DEED UNTIL HE IS OF AGE.

GUARDIAN OF ADULT MAY AVOID ANY CONVEYANCE OF PROPERTY EXECUTED BY HIS WARD while a minor, which might be avoided by the ward himself if capable of exercising the right; or where, after he is of full age, he is unable to exercise his privilege by reason of mental or legal incapacity.

IT IS COMPETENT FOR STATUTE TO MAKE ADJUDICATION OF SPENDTHRIFT'S DISABILITY relate back to the time of the commencement of proceedings against him; history of legislation upon this subject given.

CONTRACT OF SPENDTHRIFT, WHEN VOID — RATIFICATION OF MINOR'S CONTRACT, WHEN VOID. — Under section 10, chapter 109, General Statutes of Massachusetts, 1860, all contracts of a spendthrift, except for necessities, and all sales or transfers of property made by him pending proceedings against him, are void; and an adult's ratification by a sealed instrument of a conveyance of real estate made by him while a minor is a void contract, if executed after a copy of a complaint, under section 9, chapter 109, of said statutes, to place him under guardianship as a spendthrift, and of the order of notice thereon, has been filed in the registry of deeds, and after a guardian has been appointed by the probate court, and while an appeal is pending in this court, which afterwards affirms the decree of appointment.

MINOR MAY AVOID HIS DEED WITHOUT RETURN OF CONSIDERATION; but he must make his contract wholly void, if at all, so that it will no longer protect him in the retention of the consideration. His act of avoidance will divest him of all right to retain any part of the fruits of the contract he may have on hand, and the other party may reclaim it. •

MINOR IS DEPRIVED OF HIS RIGHT TO AVOID HIS CONTRACT, if after becoming of age he retains and uses or disposes of property acquired under it. Such act is an affirmance of the contract by which he acquired it.

IF MONEY PAID TO MINOR AS CONSIDERATION FOR HIS CONVEYANCE OF REAL ESTATE HAS BEEN WASTED or spent by him during his minority, payment or tender of the amount is not necessary to enable him, or if he is under guardianship, his guardian, to avoid the conveyance.

PRACTICE AS TO VERDICT AGAINST TWO JOINT DEMANDANTS. — Where two wards are joint demandants in a real action as tenants in common, and where a verdict against both has been properly rendered against one of them, the tenant is entitled to judgment against both; for where the proof of title of either is defective, the action must fail as to both, unless the writ is amended by striking out the name of one before verdict; and if a verdict has been rendered against both, under erroneous instructions as to the title of one, the judgment ought not to conclude that one, and he may therefore have the verdict set aside as to him, in order that he may become nonsuit. The tenant will then have his judgment against both demandants, and the nonsuited one may prosecute his right by a separate suit.

WRIT of entry in behalf of Samuel Chandler and John E. Chandler as tenants in common, by their guardian, Weston Earle, to recover a tract of land in Dighton. Plea, *nul disseisin*, with an averment of title in the tenant. The land was admitted by the tenant to have formerly been the property of the demandants, but was claimed by deed from John E. Chandler. It appeared that the consideration paid to John E. for his deed had not been returned or tendered to the tenant prior to the attempt of the guardian to avoid John E.'s deed. In behalf of John E. it was contended that, although the tenant might hold title as against Samuel, yet as against John E. the deed made by him while a minor was void by reason of his minority, and that his ratification of it on the day that he became of age was of no effect, by reason of the proceedings pending in relation to the guardianship. But the tenant contended that the ratification of the deed by John E. was not the making of a contract nor a sale or transfer of real estate, within the meaning of the General Statutes of Massachusetts, chapter 109, section 10; and further, that the payment or tender to the tenant before the commencement of this action of the consideration paid to John E. was necessary to enable him to recover; and also, that in this joint action no recovery could be had for either Samuel or John E. separately. The judge instructed the jury that under the pleadings and on the evidence John E. was not entitled to recover, provided that they should find that when he executed the deed and the ratification he was of sound mind. A verdict was there-

upon returned against both demandants, and John E., by his guardian, alleged exceptions. Other facts are stated in the opinion.

E. Ames and J. H. Dean, for the demandants.

G. Marston and W. H. Fox, for the tenant.

By Court, WELLS, J. These exceptions bring up the instructions under which the right of John E. Chandler to recover certain land was submitted to the jury. The defense was based upon a conveyance made by John E. Chandler while a minor, and ratified by him after he became of age. No question is made but that he is completely divested of his title, unless the pendency of proceedings against him as a spendthrift deprived him of the right to confirm his deed. These proceedings were commenced, and a copy filed in the registry of deeds, in accordance with General Statutes, chapter 109, section 10, before he became of age. The alleged ratification was made after an appeal from the decree of the probate court appointing a guardian over him as a spendthrift. Upon the appeal, a guardian was subsequently appointed by this court. The statute above referred to provides that "if a guardian is appointed upon such complaint, all contracts, except for necessities, and all gifts, sales, or transfers of real or personal estate, made by the spendthrift after such filing of the complaint and order, and before the termination of the guardianship, shall be void."

Two questions are presented: 1. Whether the deed of a minor may be avoided, after he becomes of age, by a guardian appointed over him as a spendthrift; 2. Whether the ratification of a deed, voidable only on the ground of minority, is embraced in the disabilities created by the statute.

A deed obtained by undue influence, though voidable only by the party wronged, may be avoided by a guardian afterwards appointed: *Somes v. Skinner*, 16 Mass. 348. The rights of the ward are to be asserted in his own name; but upon the appointment of a guardian, all discretion as to their exercise is taken from the ward and thenceforward intrusted to the guardian. A spendthrift under guardianship cannot even make an acknowledgment that will take his debt out of the statute of limitations. But his guardian may bind the estate of the ward by such an acknowledgment: *Manson v. Felton*, 13 Pick. 206-211. This is not denied as a general proposition, but it is contended that the right of a minor to avoid or

affirm his deed stands upon a different footing; that it is a personal privilege to be exercised only by the minor himself. The case of *Oliver v. Houdlet*, 13 Mass. 237-240 [7 Am. Dec. 134], is cited as authority to the point that the guardian of a minor cannot avoid his deed on the ground of minority. If that be so, it must be for the reason that the election, whether to avoid or affirm, is reserved to the minor until he shall be of age; and that a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward. It has, indeed, sometimes been held that the minor himself cannot avoid his deed until he is of age: *Bool v. Mix*, 17 Wend. 119 [31 Am. Dec. 285]; *Roof v. Stafford*, 7 Cow. 179; *Zouch v. Parsons*, 3 Burr. 1808. It is undoubtedly true that he cannot affirm it till then. But it is at least questionable whether he can be deprived of the right to re-enter or recover his property by suit while his minority continues: See *Edger-ton v. Wolf*, 6 Gray, 453; Bingham on Infancy, 60-63; 1 Washburn on Real Property, 306; Reeve's Domestic Relations, 254. After he is of full age, if unable to exercise his privilege, by reason of mental or legal incapacity, it seems reasonable, and consistent with the nature and purpose of this right, that it should be exercised for him, and in his name, by the guardian who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs; and we cannot doubt that it may be, also, by a guardian appointed over his property for any cause for which adult persons are placed under guardianship.

Upon the second point, it is urged that the deed of a minor may be confirmed by a mere waiver of the right to avoid, or by implication from his acts, or even from his neglect to exercise the right, and therefore that the confirmation of a deed, by which the title and seisin have already passed to the grantees, is not a contract, nor a sale or transfer of real estate, within the meaning of the statute. To this it may be answered that even a ratification by waiver, or implied from acts or from omission to avoid, requires in the party whose right is thus determined a mental and legal capacity to exercise the right, and to bind himself by such act or omission to act. But the question here does not turn upon the precise designation to be given to the confirmation of a deed in the modes suggested. It relates to positive agreements or acts of release or waiver, by which the party deprives himself and those representing

him of all right thereafter to avoid the deed and re-enter upon the estate. Such acts are certainly in the nature of contract, and require all the elements of a contract (except a new consideration) to give them effect.

It appears to us to be the purpose of the statute that the same disabilities which rest upon the ward by virtue of the guardianship, when adjudicated, shall be imposed upon him from the time of filing and recording the complaint. Notice is thereby given to the world that all dealings with him, or attempts to acquire property or rights from him, will be liable to be defeated by any decree of guardianship which may follow such complaint. It is competent for a statute thus to make an adjudication of disability relate back to the time of the commencement of proceedings.

The history of the legislation upon this subject seems to indicate that such is the intent of the statute now in force. The statutes of 1783, chapter 38, provided for the appointment and duties of guardians of lunatics, spendthrifts, etc. Section 7, which applies to spendthrifts only, contains this clause: "And no sale or bargain of any real or personal estate, made by such person or persons, after the appointment of guardianship as aforesaid, shall be held valid in law." The statutes of 1818, chapter 60, relating to spendthrifts, provided for the deposit of a copy of the complaint and order of notice in the registry of deeds, and contained the following clause: "And in case a guardian shall be appointed by the judge of probate to the person complained against, all and every gift, bargain, sale, or transfer of any real or personal estate, made by such person or persons after the filing of the copy of said complaint and order of the judge of probate with the register of deeds, shall be void and of no effect." In the case of *Smith v. Spooner*, 3 Pick. 229, it was argued by counsel that as this language, creating disabilities from the time of filing the complaint and order of notice, was substantially the same as that in the statutes of 1783, chapter 38, section 7, declaring the disabilities which should result from the guardianship, it was to be as extensively applied, so as to make invalid a note given after the recording of the complaint and before the decree.

But the court, although recognizing that "the latter statute merely anticipates the period when the acts shall become void," held that being a disabled statute it must be construed strictly, and that a promissory note was "not within the words certainly, and we think not within the spirit," of the provis-

ion. The decision was in 1825. Thereupon the statutes of 1826, chapter 63, were passed, enlarging the operation of the statutes of 1818, chapter 60, by adding, "all contracts for the payment of money or the sale of personal or real estate" to the acts previously made void by that statute. In the case of *Manson v. Felton*, 13 Pick. 206, the question was, whether a spendthrift while under guardianship could make a valid acknowledgment of his debt to take it out of the statute of limitations. To sustain the position that the statutes did not deprive the spendthrift of that capacity, the plaintiff relied upon the correspondence between the terms of the statutes of 1783, chapter 38, section 7, and the statutes of 1818, chapter 60, and the strict construction of the latter statute adopted in *Smith v. Spooner*, 3 Pick. 229. But the court, adhering to the decision in *Smith v. Spooner*, *supra*, and regarding the disability before decree as a "limited incapacity to make conveyances of property," "declared by the statutes of 1818, chapter 60," held that the disability after the decree of guardianship was complete, and rendered void any contract of the ward, and any act or admission affecting his property or pecuniary interests. This decision was in 1832; and it is noticeable that the statutes of 1826, chapter 63, seem to have escaped the attention of both court and counsel.

Upon the revision of the statutes in 1836, the provision was adopted as in General Statutes, chapter 109, section 10: See Rev. Stats., c. 79, sec. 13. Not only is the language made broader by use of the terms "all contracts excepting for necessities," but as if to manifest a purpose to make the disability before and after the decree identical, it is declared to be effective to defeat all such contracts and conveyances made "after such filing of the complaint in the registry of deeds, and before the termination of the guardianship."

Another ground relied on by the defendant is, that the deed cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained: *Gibson v. Soper*, 6 Gray, 279-282 [66 Am. Dec. 414]; *Boody v. McKenney*, 23 Me. 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him

of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration: *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; *Bigelow v. Kinney*, 3 Vt. 353 [21 Am. Dec. 589]. Or if he retain and use or dispose of such property after becoming of age, it may be held as an affirmation of the contract by which he acquired it, and thus deprive him of the right to avoid: *Boyden v. Boyden*, 9 Met. 519; *Robbins v. Eaton*, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other: *Dana v. Stearns*, 3 Cush. 372-376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo*: *Tucker v. Moreland*, 10 Pet. 65-74; *Shaw v. Boyd*, 5 Serg. & R. 309 [9 Am. Dec. 368].

Upon the case as stated in the exceptions, we are of opinion that the attempt of John E. Chandler to ratify his deed was ineffectual, and that it may be avoided now by his guardian without the previous return, or the offer to return, the consideration paid therefor. The ruling of the superior court appears to have been otherwise, and therefore these exceptions must be sustained. But as the two wards are joint demandants in the suit, as tenants in common, and as the verdict is properly rendered against the other demandant, the tenant is entitled to judgment against both. This seems to have been the early construction of the statutes of 1785, chapter 62, section 3, which authorized co-heirs and joint tenants, at their election, either to sever or to join in real actions: *Poor v. Robinson*, 10 Mass. 131; *Ornard v. Proprietors of the Kennebeck Purchase*, 10 Id. 179. The change by the statutes of 1828, chapter 137, section 3, extending this right to all tenants in common (Gen. Stats., c. 134, sec. 9), does not seem to warrant a different rule of practice in this respect. If the right of either joint demandant to recover proves defective, the action must fail, unless the writ be amended by striking out such party before verdict.

The judgment ought not, however, to conclude the right of

John E. Chandler. He may, therefore, have the verdict set aside as to him, in order that he may become nonsuit. The tenant will then have his judgment against both demandants, and John E. Chandler will be at liberty to prosecute his right by a separate suit.

Exceptions sustained.

AS TO WHETHER GUARDIAN OF MINOR CAN DISAFFIRM HIS WARD'S CONTRACTS, see note to *Oliver v. Houdlet*, 7 Am. Dec. 136.

NECESSITY FOR RETURN OF CONSIDERATION WHEN MINOR SEEKS TO AVOID HIS DEED OR CONTRACT: See *Cresinger v. Welch*, 45 Am. Dec. 565; note to *Little v. Duncan*, 64 Id. 763; *Price v. Furman*, 65 Id. 194. The infant must restore consideration if he has it; but he is not liable for a failure to return a consideration which he has wasted during infancy: See extended note to *Manning v. Johnson*, 62 Id. 734-738; *Mustard v. Wohlford's Heirs*, 76 Id. 209; *Price v. Furman*, 65 Id. 194; *Kitchen v. Lee*, 42 Id. 101; *Carr v. Clough*, 59 Id. 345; *Farr v. Sumner*, 36 Id. 327.

INFANT, AFTER COMING OF AGE, IS DEPRIVED OF RIGHT TO DISAFFIRM HIS CONTRACT, WHEN: *Creshire v. Barrett*, 17 Am. Dec. 735; *Baxter v. Bush*, 70 Id. 429; note to *Peterson v. Laik*, 69 Id. 443. On avoidance of infants' contracts generally, see extended notes to *Oliver v. Houdlet*, 7 Id. 136, 137; *Phillips v. Green*, 13 Id. 131, 132.

INFANT'S DEED IS DISAFFIRMED BY SUBSEQUENT CONVEYANCE OF SAME LAND BY INFANT after attaining his majority: *Peterson v. Laik*, 69 Am. Dec. 441; note to *Youse v. Norcome*, 51 Id. 183; *Mustard v. Wohlford's Heirs*, 76 Id. 209, note 217; but an infant's deed cannot be invalidated by his subsequent deed to another person until after he arrives at full age: *Harrod v. Myers*, 76 Id. 409.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The powers of guardians to make an election on behalf of their wards have been liberally construed in Massachusetts, when otherwise the wards would lose important rights: *Warfield v. Fisk*, 136 Mass. 220. Sales of chattels by or to an infant may be avoided by him even during minority: *Bradford v. French*, 110 Id. 366. As a general rule, a party cannot rescind a contract and retain the consideration, in whole or in part, which he has received under it; and it makes no difference in respect to the necessity of a return of the consideration whether the subject-matter of the contract be real or personal property. He must put the other party in *statu quo* and this rule applies as well to a rescission on the ground of misrepresentation and fraud as to other cases. But there is an exception to this rule in favor of infants and those who are under some form of disability; so that where the consideration of the contract has been wasted or lost during minority, the infant does not lose his right to avoid it without restoration: *Brown v. Hartford Fire Ins. Co.*, 117 Id. 480; *Bassett v. Brown*, 105 Id. 559; *Bartlett v. Drake*, 100 Id. 176, 177; *Carpenter v. Carpenter*, 45 Ind. 146. And the infant need not offer to return whatever he has received of the consideration paid on the contract: *Walsh v. Young*, 110 Mass. 399. But if an infant purchases property, and after he becomes of age retains specifically the property, and uses or disposes of it, it may be an affirmation of the contract by which he acquired it, and deprive him of the right to avoid: *Tobey v. Wood*, 123 Id. 89. The successive statutes disabling a spendthrift from making transfers of prop-

erty, pending the proceedings for the appointment of a guardian over him, have all been treated by the supreme judicial court of Massachusetts as designed to create a similiar disability, during the pendency of the proceedings, to that which would result by virtue of the guardianship when adjudicated without those statutes: *Lynch v. Dodge*, 130 Id. 459. In a writ of entry, the demandant must recover upon the strength of his own title, and not upon the weakness of that of the tenant; not merely the possession, but the title, is in issue, and he can recover only to the extent to which he proves title. A tenant in common may bring the writ without joining his co-tenants, but he is entitled to recover only the undivided portion to which he proves a sufficient title: *Butrick v. Tilton*, 141 Id. 96. If several demandants join in a writ of entry, and some of them fail to prove their title, the action must fail as to all, unless the writ is amended by striking out the names of those who have not proved their title: *Kelley v. Meins*, 135 Id. 235. The principal case was cited generally in *Nott v. Sampson Mfg. Co.*, 142 Id. 480.

COMMONWEALTH v. THACHER.

[97 MASSACHUSETTS, 583.]

LOTTERY AND LOTTERY TICKET. — A scheme called a “prize concert,” in which the prizes consist of “gifts in greenbacks,” and gifts in other kinds of property, and where “every other ticket draws a prize,” and one half of all the tickets represent blanks, constitutes a lottery; and a ticket therein purporting to entitle the holder to a prize drawn by its corresponding number is a lottery ticket.

NO OTHER DESCRIPTIVE AVERMENT OF LOTTERY TICKET IS NECESSARY where it is set forth by copy in the indictment.

DEMURRER AND PLEA OF GUILTY ADMIT TRUTH OF ALLEGATIONS IN INDICTMENT that defendant had in his possession with intent to sell, “a certain false and fictitious lottery ticket,” or “a ticket in a certain fictitious and pretended lottery,” well knowing, etc.

INDICTMENT under the statute (see Gen. Stats. 1860, c. 167, sec. 6), containing two counts. The first charged that the defendant had in possession, with intent to sell, “a certain false and fictitious lottery ticket, well knowing the same to be false and fictitious.” The second charged that he had in possession, with intent to sell, “a ticket in a certain fictitious and pretended lottery, well knowing the same to be fictitious and pretended.” Both counts were alleged to be different descriptions of the same act. A copy of the ticket was set forth. Defendant demurred to the indictment as insufficient in law. The demurrer was overruled, and he pleaded guilty. He afterwards moved in arrest of judgment, for the same reason alleged in the demurrer. This motion was overruled, and he appealed. The character of the ticket appears in the opinion.

W. P. Harding, for the defendant.

C. Allen, attorney-general, for the commonwealth.

By Court, WELLS, J. The ticket being set forth by copy in the indictment, no other descriptive averments are necessary. It purports to entitle the holder to whatever prize shall be drawn by its corresponding number, in a scheme called a "prize concert." The prizes consist of "gifts in greenbacks," and gifts in other kinds of property. One half of all the tickets represent blanks, as "every other ticket draws a prize." This clearly constitutes a lottery. In the first count the ticket, and in the second count the lottery, is alleged to be "false and fictitious." The demurrer and plea of guilty admit the truth of this allegation. No objection was taken at the trial, and none is now open to the defendant, except the general one of insufficiency of the indictment; and no particular defect is pointed out. We think the allegations are sufficient, and that the appeal should be dismissed.

LOTTERY, WHAT CONSTITUTES: See *State v. Shorts*, 90 Am. Dec. 668; *State v. Clark*, 66 Id. 723.

INDICTMENT — SELLING LOTTERY TICKETS: See *Commonwealth v. Gillespie*, 10 Am. Dec. 475.

CITATION OF PRINCIPAL CASE. — A person carried on a game, in which the public were invited to take part, described as follows: Any one wishing to play chose a number, and paid a certain sum for it; and the conductor of the game then drew an envelope from a box full of them, which envelope contained a slip with many numbers upon it. If the number chosen was found among those upon the slip, the person who chose it received a multiple of the sum paid by him, greater or less according to the odds agreed upon; if not, he lost what he had paid: held, that a jury would be warranted in finding that the game was a lottery: *Commonwealth v. Wright*, 137 Mass. 251.

COMMONWEALTH v. EMIGRANT INDUSTRIAL SAVINGS BANK.

[98 MASSACHUSETTS, 12.]

ALTERATION OF NUMBERS UPON SERIES OF NEGOTIABLE BONDS OF COMMONWEALTH IS IMMATERIAL, where the law does not require the bonds to be numbered, and the presence or absence of the number does not affect in substance or form the written contract or the proof thereof.

IMMATERIAL ALTERATION OF NEGOTIABLE BONDS PAYABLE TO BEARER, THOUGH MADE WITH FRAUDULENT INTENT, does not avoid them in the hands of a *bona fide* holder, for value without notice, whose title is acquired after the alteration.

BILL of interpleader filed by the attorney-general against the defendant, in order to determine whether certain bonds of the commonwealth had not been rendered void as against the commonwealth by reason of an alteration thereof; and if not, then what were the respective rights of the respondents in and to the same. Case reserved for determination by the full court. The opinion more fully states the case.

S. Bartlett and F. Bartlett, for the commonwealth.

J. G. Abbott, for the Emigrant Industrial Savings Bank.

By Court, HOAR, J. This case is one of great practical importance, and presents a question of much interest to the owners of a species of securities in which very large amounts of property are invested. Both parties have strong claims to the consideration of the court, and come before us with equities which make a decision against either painful. We have in effect to decide which of two innocent parties shall suffer a considerable loss; and their rights are found to depend upon the application of principles in a manner which may lead to very important consequences.

Upon the evidence reported, we have no difficulty in finding the principal facts in issue. The five bonds which form the subject of the controversy are shown by satisfactory proof to be the same which were stolen from Mr. Houghton in May, 1863. On the 7th of November, 1863, they were received by the Emigrant Industrial Savings Bank in the usual course of business, for a valuable consideration, and without notice, express or implied, of any defect in the title which the bank then acquired, and without any reasonable cause to question their genuineness. In the interval of time between these dates, the numbers of the bonds had been fraudulently altered; by whom, it does not appear; but the natural inference would be by the thief, or some one in privity with him. It is suggested in argument, on behalf of Mr. Houghton, that there is reason to suppose that the alteration was made by the broker from whom the bank received the bonds. The reasons assigned for this suggestion are, that the coupons for interest due in January, 1864, have never been presented for payment, and are not accounted for; that the broker disappeared from New York, and it is not known what has become of him; that he paid the interest on his loan, for which the bonds were given as collateral, up to December 31, 1863; that it is probable that the January coupons were then given up to

him, as the comptroller of the bank has no doubt that they were attached to the bonds when the bank received them; and that this would lead to the conclusion that the broker, learning from Mr. Houghton's advertisements that the bonds had been stolen, had altered the numbers to enable him to dispose of them in the market without suspicion, and was afraid to present the coupons for payment for fear of detection. These are certainly suspicious circumstances, though perhaps they tend as strongly to prove that the broker was privy to the theft. The only importance attached to them is this, that they might tend to show that the alteration of the numbers of the bonds was made by a lawful owner of them; and that the rule in relation to the effect of such alterations might be different from that which would be applicable if they had been made by a thief. But there is no evidence whatever upon the point whether the broker's possession of the bonds was lawful or otherwise. If he had honestly acquired a perfect title to them, it can hardly be presumed that instead of openly asserting it he would have resorted to a needless and dangerous fraud. The evidence, therefore, on this part of the case seems to us too uncertain and imperfect to warrant any satisfactory conclusion.

These bonds were payable to the holder or bearer, and were negotiable instruments which would pass by delivery. The important questions which we have to decide are: 1. Is the alteration of the numbers upon the bonds a material alteration? 2. If not, is it such an alteration as, if made with a fraudulent purpose, will discharge the contract so that it will be invalid in the hands of a *bona fide* holder, for a valuable consideration without notice, whose title is acquired after the alteration?

The statute of the commonwealth under which these bonds were issued did not require them to be numbered: Stats. 1861, c. 216. The alteration of the numbers upon the bonds did not in any particular change the liability of the obligor either in time, place, or amount. Neither the rights or interests, duties or obligations, of either party to the contract were affected by it. Indeed, it was not an alteration of the written contract at all: *Smith v. Crooker*, 5 Mass. 540; *Wheelock v. Freeman*, 13 Pick. 165 [23 Am. Dec. 674]; *Brown v. Pinkham*, 18 Id. 172. Even under the strictness of criminal pleading, where a bank bill is set forth in an indictment according to its tenor, the number of the bill need not be set

forth, and its omission is not a variance: *Commonwealth v. Bailey*, 1 Mass. 62 [2 Am. Dec. 3]; *Commonwealth v. Stevens*, 1 Id. 203. If the numbers were worn or torn off from the paper, it is evident that all the operative words of the complete contract would remain. Nor does the number of the bond change or affect the legal evidence or mode of proof of the contract as in the case of an attesting witness; and there is therefore no analogy to the cases in which it has been decided that the addition of the signature of an attesting witness was a material alteration, though not affecting the terms of the contract: *Homer v. Wallis*, 11 Id. 309 [6 Am. Dec. 169]; *Adams v. Frye*, 3 Met. 103.

No case has been cited in which such an alteration has ever been held to be material, and we are not aware that any can be found.

The reasons given in the text-books and adjudged cases for the rule that a material alteration avoids a written instrument are two; first, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of losing by the event when it is detected; the other, that the identity of the instrument is destroyed: *Masters v. Miller*, 4 Term Rep. 329; 1 Greenl. Ev., sec. 565. It is argued that the number of the bond constitutes a part of the identity of the instrument. But this is merely an ambiguous use of the word "instrument." It is a part of the identity of the paper, but not of the contract, any more than any device, picture, or impression upon it would be. The presence or absence of the number does not change the written contract in substance or in form, nor affect the proof of it. The purpose of putting it on the bond is a collateral object, convenient to the maker, and convenient and important to the holder as a means of distinguishing his property, but not affecting his rights against the maker under the written agreement. We think the change of the numbers was not a material alteration of the bonds.

The remaining question involves a point of greater difficulty. It has been held that an immaterial alteration, if made with a fraudulent intent, will avoid a written instrument: 1 Greenl. Ev., sec. 568; 2 Parsons on Notes and Bills, 572, and cases there cited. But it is to be noticed that each of these text-writers gives as the reason of the rule that the party who loses the benefit of the writing has willfully and wrongfully destroyed the identity of the contract. But if the rule is not

thus limited in its application, and if the attempt to perpetrate a fraud may be justly punished by a loss of his right to enforce the contract, it remains to be considered whether the incapacity to sue will follow the instrument into the hands of an innocent holder, who has taken it in good faith. It has indeed been decided in the case of a material alteration of a note that it becomes invalid even in the hands of a subsequent indorsee for value: *Wade v. Withington*, 1 Allen, 561. But the opinion in that case was put upon the express and only ground that the identity of the contract was destroyed,—that the indorsee had not received the note which the promisor made. We do not find that it has ever been held that even a fraudulent alteration of a paper upon which a contract is written, leaving the language of the contract in form and substance unchanged, and not affecting the manner of its legal proof, would so far affect the validity of the contract as to make it invalid in the hands of an innocent holder wholly ignorant of the fraud. The general rule is, that he who is guilty of a fraud shall not be permitted to avail himself of it. If the rule is extended further, and if on grounds of public policy it should be held that one who claims title under the fraudulent person shall only succeed to his rights, it is difficult to see the just application of the principle to the case at bar. The innocent holder of a negotiable security payable to bearer does not take his title from that of any previous holder, but under the original contract of the promisor, as construed by the law. The thief who stole these bonds had no title to them whatever. The innocent holder does not claim under him, in form or substance. The promisor may have parted with them without consideration, but that makes no difference. The promise to pay to the bearer or holder attaches to the possession for value without notice of the unaltered contract.

The numbers placed upon these bonds gave to the commonwealth means of checking or detecting an over-issue of them, perhaps some security against forgery, and the means of tracing the particular instrument through successive changes of ownership. To the owners of the bonds after they were issued they afforded the means of identifying their property. But this might have been done by a private mark upon the back of the paper, or by the stamping of the owner's name upon it. We cannot think that the fraudulent removal of such a mark of identification could affect the rights of parties not privy to the fraud, nor affected with notice of it. The case is wholly dif-

ferent from those cited in argument, of securities tainted with usury, and the like, where a statute makes the contract void, into whosoever hands it may come. Here is no statute impediment. Nor is the holder met with the difficulty that, though without his own fault, he has failed to receive the contract which the promisor made. He is innocent of any fraud; he has the contract, unchanged in form, and with nothing added or taken away which affects its obligation or proof. It is a question of the policy of the law, which discountenances fraud, but seeks to inflict the penalty for it only on the fraudulent; and which protects the free circulation of negotiable paper.

In the courts of New York, it has recently been held that the fraudulent alteration of the numbers of stolen bonds would not invalidate the title of a subsequent innocent holder: *Smith v. Illinois Central R. R. Co.*, superior court of the city of New York, March term, 1865; *Birdsall v. Russell*, 29 N. Y. 239.

We are all of opinion that the Emigrant Industrial Savings Bank has established its title to the bonds in question against the commonwealth, and is entitled to a decree accordingly.

ALTERATION OF NOTE, EFFECT OF: *Lewis v. Schenck*, 90 Am. Dec. 631; *Fay v. Smith*, 79 Id. 752, and note 754; *Ames v. Colburn*, 71 Id. 723, and note 724.

MATERIAL ALTERATION OF WRITTEN CONTRACT, without consent of parties, discharges them from liability: *Brownell v. Winnie*, 86 Am. Dec. 314, and cases collected in note 318; but an immaterial alteration of a written contract does not affect it: *Reed v. Roark*, 65 Id. 127; *Struthers v. Kendall*, 80 Id. 610.

ALTERATION OF WRITTEN INSTRUMENT IMMATERIAL, WHEN: *Vogle v. Ripper*, 85 Am. Dec. 298, and see note 301; *Lazier v. Westcott*, 82 Id. 404.

MATERIAL ALTERATION DEFINED: *Reed v. Roark*, 65 Am. Dec. 127, and note 128.

MATERIAL ALTERATION OF NEGOTIABLE INSTRUMENT invalidates it in the hands of an innocent holder: *Trigg v. Taylor*, 72 Am. Dec. 263.

THE PRINCIPAL CASE IS CITED to the point that an alteration of a contract which will avoid it must be such that the identity of the contract is destroyed, in *Cambridge Sav. Bank v. Hyde*, 131 Mass. 78; *Vose v. Dolan*, 108 Id. 153; and to the point that coupons of government bonds are not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer, in *Spooner v. Holmes*, 102 Id. 507.

NICHOLS v. CITY OF BOSTON.

[98 MASSACHUSETTS, 89.]

EXCLUSIVE POSSESSION AND USE, FOR MORE THAN TWENTY YEARS, of a dock adjoining a wharf extending into tide-water, for loading and unloading vessels, is sufficient, under the Massachusetts statute, to establish title thereto by prescription against the commonwealth.

PARTY WHO ACQUIRES TITLE TO PREMISES ON WHICH NUISANCE EXISTS BECOMES LIABLE to other persons injured by the continuance of the nuisance after due notice to remove it.

KNOWLEDGE BY GRANTEE OF LAND OF CONTINUANCE OF NUISANCE THEREON, WHEN HE ACQUIRED TITLE, is not shown by the fact that he had knowledge of a judgment against his grantor for a like nuisance existing thereon the year previous to the conveyance.

NOTICE OF NUISANCE ON LAND BELONGING TO CITY, AND REQUEST TO REMOVE IT, GIVEN TO CITY CLERK ONLY, is insufficient to affect the city, but is sufficient if given to the mayor.

TORT for obstructing the plaintiff's dock, and depriving him of the use of his wharf. Case submitted to the full court upon an agreed statement of facts sufficiently set out in the opinion.

A. A. Ranney and G. W. Park, for the plaintiff.

C. H. Hill, for the defendant.

By Court, GRAY, J. The plaintiff is the lessee of a wharf in Boston, known as Lincoln's Wharf, and of a dock or berth for vessels by the side thereof, which lies below the original line of low-water mark; and the first question in the case is, whether he has proved such a title to this dock as to entitle him to maintain an action for obstructing the access of vessels to it.

It appears by the plan and evidence introduced at the trial, and the facts agreed by the parties, that the dock is about 130 feet long by 30 feet wide, open only at the easterly end towards the channel, bounded on the southerly side and the westerly end by the wharf, and on the northerly side, since 1853, by a row of piles constituting the slip of the ferry of the People's Ferry Company, and before that time by a narrow platform built before 1830 on piles standing on the same line and used by the superintendent of the Boston Marine Railway Company to walk out and stand upon while giving directions about bringing vessels into the premises of that company to the northwards, on which they had erected a railway for the repair of ships and vessels under the authority given by the statutes of 1825, chapter 68; that the plaintiff's dock has been used by him and his lessors for more than forty years for the

purpose of approaching the wharf with vessels, and loading and unloading them there, and has not been and could not be used for any other purpose; and there is no evidence that any other person has ever used the dock or had occasion to use it. These facts show an exclusive possession and use by the plaintiff and those under whom he claims, and would be sufficient to prove a title by disseisin as against a private proprietor: *Rust v. Boston Mill Corporation*, 6 Pick. 162, 171; *Wheeler v. Stone*, 1 Cush. 315, 322.

The fact that the soil of this dock was covered by the sea even at low water, and therefore once the property of the commonwealth, does not defeat the plaintiff's right to maintain this action. By the common law of England, the king owned all lands covered by tide-water, and all ports, harbors, and arms of the sea within the realm; holding both the *jus privatum*, or private property in the soil, which he might grant to a subject, and the *jus publicum*, or prerogative right for the common use and benefit of all his subjects for the purposes of navigation and commerce, which could not be granted away to the injury of the common right of navigation without an act of Parliament; but it might be determined on a writ of *ad quod damnum* that such a grant would cause no injury to any public right: *Commonwealth v. Alger*, 7 Cush. 82, 83, 90-94, and authorities cited; *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192. A royal grant, therefore, would not of itself protect from indictment as a nuisance a wharf which encroached upon and impaired the common right of navigation. But as Lord Hale observes in his treatise *De Portibus Maris*, "Nuisance or not nuisance is a question of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is *ipso facto* in law a nuisance. For that would destroy all the keys that are in all the ports of England. For they are all built below the high-water mark; for otherwise vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, for the king cannot license a common nuisance": *Hargrave's Law Tracts*, 85. And even by the law of England, by which no time ran against the king, a sufficient grant of the seashore above or below low-water mark, to the exclusion of the public right of navigation, might be presumed from

long, continuous, and exclusive occupation: *Chad v. Tilsed*, 5 Moore, 185; S. C., 2 Brod. & B. 403; *King v. Montague*, 4 Barn. & C. 598; S. C., 6 Dowl. & R. 616; 3 Kent's Com., 6th ed., 427; Angell on Tide-waters, c. 9; Metcalf on Contracts, 296. The claim founded on royal grant and immemorial usage, which was disallowed by the house of lords, reversing the judgments of the common bench and exchequer chamber, in *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192, was of a toll or anchorage on every vessel anchoring in a certain arm of the sea below low-water mark, which was a necessary part of the right of navigation.

The commonwealth of Massachusetts has all the title and rights, public and private, both of the king and the Parliament of England in every part of the seashore of the commonwealth which has not vested in individuals or corporations under the colonial ordinance of 1647, or other act of the government; and the legislature may grant the title in the soil, or the right to build wharves thereon, below as well as above low-water mark: *Gilman v. Philadelphia*, 3 Wall. 726; *Fitchburg R. R. v. Boston and Maine R. R.*, 3 Cush. 87, 88; *Commonwealth v. Alger*, 7 Id. 53; *Commonwealth v. Roxbury*, 9 Gray, 451; *Attorney-General v. Boston Wharf Co.*, 12 Id. 553; *Winnisimmet Co. v. Wyman*, 11 Allen. 432. By the Revised Statutes of 1836, the time of limitation of real actions by the commonwealth was made the same as of those by individuals, and twenty years' exclusive possession barred the right of the commonwealth to maintain an action for the recovery of flats: R. S., c. 119, sec. 12; *Piper v. Richardson*, 9 Met. 157, 158; Gen. Stats., c. 154, sec. 12. The same period of time which is fixed by the statutes of limitation gives a title by prescription or adverse possession, and warrants the presumption of a grant which is not produced: *Edson v. Munsell*, 10 Allen, 557.

The statutes of 1837, chapter 229, establishing lines in Boston harbor beyond which no wharves or piers should be extended into the tide-water of the commonwealth, and prohibiting the extension without leave of the legislature of any wharf or pier already erected within such lines further towards them than it already was or might lawfully have been, contains no express grant of a right to maintain any wharf beyond low-water mark; but has no tendency to rebut any presumption of a title by prescription or grant which might by the general principles of law arise from continuous and exclusive occupation.

The plaintiff had therefore acquired a title to this dock, even as against the commonwealth, before the passage of the statutes of 1867, chapter 275, providing that the statute of limitations should not apply to any right of the commonwealth below high-water mark; and may maintain an action against any trespasser thereon.

The obstruction complained of was occasioned by the ferry-boats pressing against the line of piles on the northerly side of the plaintiff's dock, and crowding the piles over towards his wharf, so as to remain in that position and obstruct the entrance of the dock. On the 4th of March, 1859, while the piles stood thus, the People's Ferry Company (who were authorized by their charter to convey to the city of Boston), made a warranty deed to the city of their land and buildings, and the rights, easements, privileges, and appurtenances thereto belonging; and by a contemporaneous agreement with the city bound themselves to maintain and run the ferry for ten years "in such manner, and at such rates of toll, and upon such terms and conditions, as the board of aldermen of the said city of Boston, with the approval of the mayor thereof, shall from time to time prescribe; the People's Ferry Company having the use of the property and estate conveyed" as aforesaid, "so far as it may be needed for the purpose, without any charge or payment of rent."

By accepting the deed, and claiming under it, the city held and asserted a title to the premises conveyed; and the additional agreement did not make the ferry company tenants thereof, or give them any estate in or occupation of the same, except as the agents of the city and subject to its control: *Kirby v. Boylston Market*, 14 Gray, 249 [74 Am. Dec. 682]. The city therefore stood in the position of a party who acquires title to land on which a nuisance exists, and who becomes liable to other persons injured by its continuance, if he suffers it to continue after notice of its existence and a request to remove it: *McDonough v. Gilman*, 3 Allen, 264 [80 Am. Dec. 72].

The judgment obtained by the plaintiff against the ferry company for a like nuisance existing in 1858, although actually known to the city when it acquired its title the next year, had no tendency to show knowledge in the city that the nuisance continued to exist. The notice given to the city clerk, immediately after that conveyance, was also insufficient to affect the city, because the clerk is but a recording officer,

unauthorized to receive or to act upon any such notice. But the mayor is by the city charter the chief executive officer of the corporation, whose duty it is to be vigilant and active at all times in causing the laws for the government of the city to be duly executed, to inspect the conduct of all subordinate officers, and cause all negligence and violation of duty to be punished, and who has the power to summon meetings of the board of aldermen and of the common council at any time: Stats. 1854, c. 448, sec. 46. The notice to the mayor, on the 1st of January, 1864, of the existence of the obstruction, and request to remove it, was therefore sufficient to bind the city, and to make the city liable for its continuance from that time until it was removed in July, 1865.

Judgment for the plaintiff accordingly.

TWENTY YEARS' UNINTERRUPTED USER OF EASEMENT is *prima facie* evidence of right to use such easement: *Heatt v. Morris*, 78 Am. Dec. 280, and cases collected in note 285.

TITLE BY PRESCRIPTION, WHAT MUST BE SHOWN TO SUSTAIN: *Rhodes v. Whitehead*, 84 Am. Dec. 631.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST SOVEREIGN POWER in the absence of express words to that effect: *Cincinnati v. First Presbyterian Church*, 32 Am. Dec. 718; and see *Moody v. Fleming*, 48 Id. 210; *Hoey v. Furman*, 44 Id. 129; *United States v. White*, 37 Id. 374; *Smith v. De la Garza*, 65 Id. 147.

GRANTEE OF PREMISES ON WHICH THERE IS NUISANCE MAY BE HELD LIABLE for its continuance: *Pillsbury v. Moore*, 69 Am. Dec. 91, and cases collected in note 94; *Crommelin v. Coze*, 68 Id. 120; but not until upon request he refuses to remove the nuisance: *Eastman v. Amoskeag Mfg. Co.*, 82 Id. 201.

THE PRINCIPAL CASE IS CITED as follows, and to the points stated: An action lies against a grantee, who, after notice to remove it, maintains a nuisance erected by his grantor: *Fowle v. New Haven etc. Co.*, 107 Mass. 355; *Brown Paper Co. v. Dean*, 123 Id. 269. A city or town cannot be held liable for damages occasioned by a defect in a highway, unless some proper officer, whose duty it is to attend to municipal affairs, has received reasonable notice of the same: *Foster v. City of Boston*, 127 Id. 290. In a suit brought by the board of health of a city to restrain the exercise of an offensive trade or employment which it has prohibited, the bill may properly be signed by the mayor: *City of Taunton v. Taylor*, 116 Id. 262. Building a wharf and using the flats at the end and sides of it to lay vessels, for the purpose of loading and unloading them, is a disseisin of the flats covered by the wharf, and of the flats at its end and sides, so far as exclusively used by such vessels: *Tyfts v. Charlestown*, 117 Id. 402; in the case last cited, and in the principal case, the flats in question were inclosed by permanent structures which excluded the public, and are so distinguished in *Hittinger v. Eames*, 121 Id. 547; and see *Haskell v. New Bedford*, 108 Id. 216, citing the principal case.

HAWKESWORTH v. THOMPSON.

[98 MASSACHUSETTS, 77.]

INJURY FROM OVERFLOW CAUSED BY NEGLIGENT CONSTRUCTION OF DRAIN LEADING INTO COMMON SEWER, LIABILITY FOR. — The plaintiff and the defendant were abutters on a passage-way, through which ran the common sewer used by such abutters. The tide ebbed and flowed through the sewer, and the plaintiff for more than twenty years had used it for the purpose of draining his cellar. The defendant, in attempting to lay a drain from his cellar into the sewer, opened the walls of the latter, and removed the earth around it, and replaced the earth so loosely that the water escaped from the sewer through the opening and the loose earth into the plaintiff's cellar, and injured his property. *Held*, that the defendant was liable for the injury done, although his acts in building the drain were done upon his own land.

ACTION LIES AGAINST TWO JOINTLY WHO JOINTLY SUPERINTENDED work which was so negligently done, on the land of one of them, that it caused injury to the plaintiff, although one rendered his services to the other gratuitously, and not under any contract.

TORT. The plaintiffs, Hawkesworth and others, were lessees of a warehouse on a certain street, and the defendant Thompson owned another warehouse on the same street. This action was brought against Thompson and one Mitchell, as Thompson's servant, for so negligently connecting a drain from Thompson's premises with a common sewer running through a passage-way in the rear of both warehouses as to cause water to flow into the plaintiffs' cellar, and injure their property. The evidence showed that the defendant Mitchell did not contract to lay the drain, but that he superintended the work of the laborers who did lay it, at the request of Thompson's agent. It was also shown that part, if not the whole, of the water that did the damage first flowed through Thompson's cellar, and then trickled through the intervening walls. Other facts appear in the opinion. Judgment for the plaintiffs, and the defendants appealed.

G. S. Hale, for the plaintiffs.

J. G. Abbott and B. Dean, for defendant Thompson

W. P. Harding, for defendant Mitchell.

By Court, CHAPMAN, J. We do not think the fact that the whole of the land upon Fulton Street between Cross and Richmond Streets, including the premises of the plaintiffs and the defendants, was originally subject to the ebb and flow of the tide, is material; for the land between Fulton Street and Commercial Street was filled up, and the foundation walls of the

existing buildings were built, between thirty and forty years ago. The passage-way in the rear of the premises was then laid out, and has ever since been used, and the sewer in the middle of the passage-way from Cross Street to Richmond Street, which is found by the auditor to be a public sewer, was made prior to 1842. After this lapse of time, the parties have the same rights in respect to each other that they would have had if the tide had never flowed there since the memory of man. The sewer was constructed in pursuance of a petition and agreement made by certain abutters, including those from whom the parties in this action derived their respective titles, and filed with the board of aldermen of the city of Boston, and it is stated that, if the city would continue the sewer to the dock, they would pay the expense of making so much of it as passed in the rear of their several estates.

The tide ebbs and flows through this sewer, which is of wood, but the walls of the sewer, and the earth which was packed around it, have been sufficient to prevent the escape of the tide-water from the sewer into the plaintiffs' cellar, and ever since 1842, or an earlier date, they have used the sewer for the purpose of draining their own cellar by means of a hollow log and hollow plug, so arranged as to prevent the reflux of the water at high tide. By these arrangements and this use these parties have acquired certain rights in the sewer, not only as a means of drainage, but of protection against the influx upon their premises of the water which flows through it. Each of them has an adverse right as against the others to enjoy it as a sewer, and as an embankment to protect him from being injured by the water that flows through it, whether it be tide-water flowing from the sea or fresh water flowing to the sea. In addition to this, the city has an interest in it, which it holds for the benefit of all persons who have a right to use it for drainage, or whose estates may be affected by it, as well as for the public.

The acts of the defendant Thompson which are complained of were done in attempting to lay a drain from his cellar into this common sewer. He opened the walls of the sewer, and removed the earth around it, and replaced the earth so loosely that the water escaped from the sewer through the opening and the loose earth into the plaintiffs' cellar and injured their property. The auditor finds that this was in consequence of the negligence of Thompson and his servants. It is not material whether the water came from the sea or came from

above, or whether it came from the plaintiffs' cellar and was prevented by the high tide from flowing to the sea, and so filled the sewer. In either case the injury was occasioned by the negligence of the defendants in opening and not properly closing this common embankment.

The fact that all Thompson's acts were done upon his own land is not material. One may be liable to his neighbor for acts done upon his own land which occasion an injury to that neighbor.

It is contended that Mitchell is not liable jointly with Thompson. But the auditor finds that he was present and superintended the work, and that the damage to the plaintiffs was caused by his negligence as well as that of Thompson. Superintendence implies direction; so that both the defendants must be regarded as having directed the work to be done. The fact that Mitchell rendered his services gratuitously is not material. The injury to the plaintiffs was not direct, but consequential, and both defendants are liable on the same ground; namely, that both were negligent in respect to directing the workmen. Their liability does not rest upon different grounds, as in the case of *Parsons v. Winchell*, 5 Cush. 592 [52 Am. Dec. 745], where the servant was liable for his own act, and the master was liable because he had negligently employed a careless servant. In this case the defendants are jointly liable.

Judgment for the plaintiffs.

LIABILITY OF PRINCIPAL OR MASTER for torts of agent or servant: *Moir v. Hopkins*, 63 Am. Dec. 312, and note 315; *Morehouse v. Northrop*, 89 Id. 211; *Korah v. City of Ottawa*, 83 Id. 255.

PERSON BECOMES JOINT TORT-FEASOR by co-operating in, encouraging, aiding, advising, or assenting to the commission of a wrongful act: *Richardson v. Emerson*, 62 Am. Dec. 694, and note 696; *Banfield v. Whipple*, 87 Id. 618, and cases collected in note 621.

APPLICATION OF MAXIM, *Sic utere tuo ut alienum non laedas*, applied: *Stinson v. New York Cent. R. R. Co.*, 88 Am. Dec. 332; *Moody v. McClelland*, 84 Id. 770.

BOTH OR EITHER OF TORT-FEASORS MAY BE SUED BY INJURED PARTY at his election: *Creed v. Hartmann*, 86 Am. Dec. 341, and note 346.

LIABILITY OF MUNICIPALITY FOR DAMAGES FROM OVERFLOW OF SEWER: *Wallace v. City of Muscatine*, 61 Am. Dec. 131; *Perry v. City of Worcester*, 66 Id. 431, and note 435.

THE PRINCIPAL CASE IS CITED to the point that the fact that a wrongful act is a breach of a contract between the wrong-doer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby, in *Osborne v. Morgan*, 130 Mass. 104.

STIMSON v. CONNECTICUT RIVER RAILROAD COMPANY.

[98 MASSACHUSETTS, 83.]

RAILROAD COMPANY CANNOT BE HELD LIABLE, EITHER TO OWNER OR AGENT, on its ordinary contract to carry a passenger, for losing samples of merchandise delivered into its charge by the agent of the owner as his personal baggage; nor in tort, except for gross negligence.

MERE FAILURE OF RAILROAD COMPANY TO DELIVER BAGGAGE OF PASSENGER at a point on its road is not evidence of negligence on the part of a connecting railroad which sold the passenger tickets over both roads to such point, and checked his baggage accordingly.

CONTRACT, with a count in tort, for the value of a valise and contents, the property of the plaintiffs. The valise and samples of merchandise contained in it were intrusted by the plaintiffs to their traveling agent to sell goods by sample. The agent bought at Northampton from the defendant corporation a ticket entitling him to be carried to Boston over the defendants' road and two connecting lines. He delivered his baggage, including the valise in question, to the baggage-master at Northampton, and received checks therefor, at the time he took passage on the defendants' train. On arriving at Boston, he presented the checks for his baggage at the depot of the last line over which he traveled, and received the valises containing his clothing, but the valise in question could not be found then nor since. It further appeared in evidence that the agent had been engaged in the same kind of business for two years, and during that time had frequently passed over the defendants' road and many others. The plaintiffs offered evidence to show "that it was a general custom of merchants or their agents to travel and sell goods by samples, and to carry with them valises or trunks containing samples, and receive checks therefor in the same manner as for ordinary baggage"; and also "a general custom of railroads, and of the defendant corporation in particular, to receive and check for the same in the same manner as ordinary baggage." The judge rejected this evidence, and ruled that the defendants were not liable in contract to the plaintiffs for the loss, and that there was no evidence upon which the jury could render a verdict for the latter on the ground of gross negligence. A verdict was accordingly directed for the defendants, and the plaintiffs alleged exceptions.

C. S. Lincoln, for the plaintiffs.

A. A. Ranney, for the defendants.

By Court, HOAR, J. The defendants had no contract with the plaintiffs. Their contract was with Edwards, the plaintiffs' agent; and it was a strictly personal contract for his safe transportation over the railroads, to which the carriage of suitable personal baggage was merely incidental. Edwards had no right to transport merchandise under cover of his personal baggage; much less could he take merchandise in that manner which belonged to other persons, and thereby give them the rights of a contracting party against the defendants: *Jordan v. Fall River R. R. Co.*, 5 Cush. 69 [51 Am. Dec. 44]; *Collins v. Boston and Maine R. R.*, 10 Id. 506; *Hawkins v. Hoffman*, 6 Hill, 586 [41 Am. Dec. 767]. The count upon a contract, therefore, cannot be supported.

Upon the count in tort, the burden of proof was upon the plaintiffs to show the gross negligence upon which their cause of action depended. The party charging negligence must prove it; and no evidence of it was offered. The failure to deliver the valise in Boston was not evidence of negligence, because there was nothing to show that this failure was the consequence of anything done or omitted on the defendants' railroad.

Exceptions overruled.

LIABILITY OF COMMON CARRIER FOR BAGGAGE OF PASSENGER: *Roth v. Buffalo etc. R. R. Co.*, 90 Am. Dec. 736, and cases collected in note 740; *Hickox v. Naugatuck R. R. Co.*, 84 Id. 143; loss of baggage on one of two connecting lines: *Baltimore Steam Packet Co. v. Smith*, 87 Id. 575.

BAGGAGE CHECKS AS EVIDENCE OF DELIVERY OF BAGGAGE TO CARRIER: *Davis v. Michigan Southern R. R. Co.*, 74 Am. Dec. 151; *Illinois Cent. R. R. Co. v. Copeland*, 76 Id. 749; *Hickox v. Naugatuck R. R. Co.*, 84 Id. 143.

RAILROAD COMPANY MAY ASSUME RESPONSIBILITY FOR SAFE TRANSPORTATION OF BAGGAGE beyond the limits of its own road: *Najac v. Boston etc. R. R. Co.*, 83 Am. Dec. 686; see *Pennsylvania R. R. Co. v. Schwarzenberger*, 84 Id. 490..

WHAT IS BAGGAGE TO WHICH PASSENGER IS ENTITLED: *Hutchings v. Western etc. R. R.*, 71 Am. Dec. 156, and extended note 158; merchandise is not: Id. 160.

THE PRINCIPAL CASE IS CITED to the point that if merchandise, not disclosed, is included in a passenger's baggage, the railroad corporation is not responsible for it as a common carrier, in *Blumantle v. Fitchburg R. R.*, 127 Mass. 324; *Aling v. Boston etc. R. R. Co.*, 126 Id. 130.

KINCAID v. EATON.

[98 MASSACHUSETTS, 139.]

DISCOVERY OF ARTICLE VOLUNTARILY LAID DOWN BY OWNER within a banking-house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article, entitling the person discovering it to a reward offered to the finder.

CONTRACT for the recovery of a reward offered by the defendant in the following terms: "One hundred and ten dollars reward. Lost, a pocket-book containing papers valuable only to the owner. The finder can have the above reward by returning book and contents to the Transcript office," being the office of a newspaper published in Boston. The evidence on the trial in substance was, that the defendant made a deposit in the Merchants' Bank in the city of Boston, and passed out of the banking-room as the plaintiff went in to deposit money for his employers, and no person other than the bank officers was in the room at the time. The plaintiff made his deposit, and on leaving the room saw and took possession of a pocket-book which was lying on a desk standing outside the counters used by the tellers, and provided for the convenience of the bank's customers. Supposing it to be the property of the man who had passed out, he endeavored to overtake him, but did not succeed. He then took it to the office of his employers, and it was found to be marked with the defendant's name, and to contain promissory notes and other papers to the amount of more than a thousand dollars. The plaintiff ascertained the defendant's place of business, and called there several times that day and on the second day afterwards, but could not find the defendant there. He then left the pocket-book with a teller in the Merchants' Bank, for delivery to whoever should inquire for it. The defendant had inquired for it there an hour earlier, and about the time the advertisement above set out was first published. The plaintiff heard of the advertisement soon after leaving the pocket-book at the bank, and immediately went to the Transcript office, where he was advised to take it to the defendant's residence. He returned to the bank and was told that no one had inquired for it, and the teller gave it to him, and he delivered it to the defendant at his residence, and demanded the offered reward. The defendant produced a roll of bank bills and told the plaintiff to help himself, and the latter replied that he wanted only the reward. The defendant then said that he "had no

business to have kept the pocket-book," and asked if ten dollars would satisfy him. To which the plaintiff replied that it would not, as it was not the reward advertised. The defendant then said that he "supposed some thief had got the pocket-book, and so advertised that way." The plaintiff then took the ten dollars, but again said that it did not satisfy him. A verdict was found for the plaintiff on this evidence, in accordance with the judge's instructions, and the defendant alleged exceptions.

R. Codman, for the defendant.

E. M. Bigelow, for the plaintiff.

By Court, WELLS, J. Upon the facts of this case and the authorities cited (*McAvoy v. Medina*, 11 Allen, 548 [87 Am. Dec. 733]; *Lawrence v. State*, 1 Humph. 228 [34 Am. Dec. 644]; *Wentworth v. Day*, 3 Met. 354 [37 Am. Dec. 145]; *Symmes v. Frazier*, 6 Mass. 345 [4 Am. Dec. 142]), the plaintiff did not come into possession of the pocket-book in such manner as to give him the special property therein which belongs to the finder of an article lost by the owner. By the terms of the advertisement, the reward could be earned only by the return of the pocket-book by one who had entitled himself to those rights by finding. To discover an article voluntarily laid down by the owner within a banking-house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article. The occupants of the banking-house, and not the plaintiff, were the proper depositaries of an article so left. The plaintiff has not established a legal right to the reward according to the terms by which it was offered, and therefore cannot retain his verdict.

Exceptions sustained.

PROPERTY PLACED IN PARTICULAR PLACE AND INADVERTENTLY FORGOTTEN BY OWNER is constructively in his possession, and is not lost: *Lawrence v. State*, 34 Am. Dec. 644; and see *State v. Homes*, 57 Id. 269, and note 284.

WHEN OWNER OF PROPERTY IS IN CONSTRUCTIVE POSSESSION: See *Pritchett v. State*, 62 Am. Dec. 468.

PROPRIETOR OF SHOP IS ENTITLED TO POSSESSION OF POCKET-BOOK which has been accidentally left by another upon a table there, and has remained uncalled for, as against a stranger who first sees it there. Property so left is not to be treated as other lost property, so as to entitle the finder to take and hold possession: *McAvoy v. Medina*, 87 Am. Dec. 733.

BRADLEY v. POOLE.

[98 MASSACHUSETTS, 169.]

IT IS WHOLLY WITHIN DISCRETION OF COURT TO GRANT OR DENY a motion made, after a plaintiff has put in his evidence, for a ruling that, "assuming that all the facts offered to be proved by the plaintiff were actually and fully proved, the plaintiff was not entitled to recover," and no exception lies to its decision.

FINDING BY JURY THAT DEFENDANT ACTED AS PRINCIPAL IN SALE OF STOCK IS WARRANTED, where, in reply to inquiries of the plaintiff, who was about to buy, he said that he could "let him have some," or "buy him some," that he "would probably get it at a dollar and a half per share," and that the stock "is all right"; it also appearing that the transfer of the certificate to the plaintiff was signed by a person as the defendant's attorney, and that the money was paid to the defendant.

INSTRUCTIONS TO JURY—FALSE AND FRAUDULENT REPRESENTATIONS.— The plaintiff bought certain pretended shares in a corporation fraudulently organized, induced thereto by the alleged false and fraudulent representations of the defendant "that said corporation was all right, and would immediately prosecute the development of its property, and the business for which it was organized." *Held*, that it was properly left to the jury to interpret these statements, in connection with all the circumstances of the case.

KNOWLEDGE ON PART OF PLAINTIFF OF CONDITION OF CORPORATION, *held* to be insufficient ground, in the particular case, for setting aside a verdict in his favor rendered in an action brought by him to recover money obtained by false and fraudulent representations made in the sale of stock.

ACTION of contract to recover money received to the plaintiff's use, alleged to have been paid to the defendant, in consequence of false and fraudulent representations made by him, for certain pretended shares in a corporation fraudulently organized, which shares the plaintiff afterwards tendered back. The alleged false and fraudulent representations were, that "said corporation was all right, and would immediately prosecute the development of its property in Colorado, and the business for which it was organized, and that said shares were of great value." Other facts appear in the head-note and opinion. Verdict for the plaintiff, and the defendant alleged exceptions.

C. B. Goodrich and T. H. Sweetser, for the defendant.

T. M. Hayes, for the plaintiff.

By Court, CHAPMAN, J. After the plaintiff's testimony was put in, the defendant's counsel requested the court to rule that, assuming that all the facts offered to be proved by the plaintiff were actually and fully proved, the plaintiff was not

entitled to recover, and the case should be withdrawn from the jury, and a verdict directed for the defendant. This motion was denied, and the defendant excepts to the decision. But it is settled that it is a matter of discretion with the presiding judge whether he will grant or deny such a motion: *Bassett v. Porter*, 4 Cush. 487; *McGregory v. Prescott*, 5 Id. 67; *Wentworth v. Leonard*, 4 Id. 418. No exception therefore lies to his decision. The defendant then proceeded to offer evidence in the case; and by the authority of the cases cited, this was a waiver of his motion.

After all the evidence was in, the defendant renewed his motion that the jury be instructed that there was no evidence of false and fraudulent representations on the part of the defendant. The judge declined to make such a ruling, and the evidence was submitted to the jury. The ruling is to be sustained if there was any evidence sufficient in law to authorize the jury to find that there were materially false and fraudulent representations on the part of the defendant. But several points were argued before the jury, and the instructions given to them by the presiding judge not only included the point above stated, but embraced the general principles of law which are applicable to cases of this character. These instructions are excepted to.

The attention of the jury was directed, not only to the representations made to the plaintiff at the time he purchased the stock, and the condition of the corporation at that time, but to the original character and object of the scheme.

The representations proved and relied upon were: "They are going right to work upon it. It is all right." It was properly left to the jury to interpret these statements. In connection with the circumstances of the case, and the rest of the conversation between the parties, they would be authorized to interpret them as representations that the company had pecuniary means to engage in the business of mining upon their lands in Colorado, and had made arrangements to do so immediately, and that no legal obstacle existed to the prosecution of their business or the transfer of stock upon their books.

The evidence tended to show that the actual condition of things was very different from this. The company was organized in February, 1864, and the defendant was one of the projectors. The capital stock was fixed at five hundred thousand dollars, and the par value of the shares at five dollars,

so that there would be a hundred thousand shares. It would be legally competent to the jury to find that this small value of the shares was intended rather as a lure to certain classes of purchasers of shares who might be easily imposed upon, than as indicating an intention to prosecute the business of mining. No money was paid by any of the associates to constitute this stock. All the property which the corporation had was certain mining lands in Colorado which were conveyed to them by Coffin. They paid him no money for them. They fixed the price at a hundred and twenty thousand dollars, and gave checks for that amount. But they had no money on deposit to pay these checks; and the jury might believe that it was a fictitious arrangement, for the checks were immediately given up, and Coffin accepted in their stead thirty thousand shares of the stock. His land being the only capital possessed by the company, these shares were equivalent to three tenths of it; subject, however, to a debt of ten thousand five hundred dollars due to the defendant for money which he had advanced. If they valued the shares at the price for which the defendant sold to the plaintiff, Coffin's shares would be worth forty-five thousand dollars. If they were valued at par, they would be worth a hundred and fifty thousand dollars, so that the price of one hundred and twenty thousand dollars was merely nominal. The value of the land was then called four hundred thousand dollars, and twenty thousand shares were reserved to be sold in order to obtain the other one hundred thousand dollars. The jury might believe that they never expected to raise such a sum in such a way; and that a hundred and twenty thousand dollars was, to the knowledge of all of them, a grossly exaggerated estimate of the value of the land, and that the projectors understood that the principal value of their stock consisted in the ingenious scheme which they had adopted for putting the shares in the market.

While they were in possession of no property except the land, and owed the defendant ten thousand five hundred dollars, the president, treasurer, and three directors, of whom the defendant was one, made a certificate under oath, and filed it with the treasurer of the commonwealth on the 16th of March, 1864, in compliance with the requirements of General Statutes, chapter 61, section 8, in which they made the following statement: "The amount of capital stock is five hundred thousand dollars; the par value of the shares is five dollars per share;

the amount paid in is four hundred thousand dollars." The jury might believe that this statement as to the amount paid in was false and fraudulent, and was designed to defraud the public.

On the sixth day of September, 1864, an injunction was served upon the company, restraining them from doing any more business because they had not paid a tax of three hundred dollars which had been assessed upon them by the commonwealth; and this injunction has never been removed. The jury would be authorized to take this fact into consideration in estimating the value of their property, and deciding whether their scheme was *bona fide* or fraudulent. After this, the plaintiff purchased his stock, and it was transferred to him on November 29, 1864.

The jury might upon this evidence believe that the company was not all right, but that it could not legally proceed to do any business; that it was not going right to work, and had neither the means nor the intention to do so; that the original scheme was fraudulent, and the property was estimated at a grossly fictitious value, and that the defendant and his associates had been guilty of false swearing in their official certificate for the purpose of promoting their scheme. All these matters were properly submitted to the jury, with instructions sufficiently full and appropriate. It may be well to refer to some of the cases in which some of the principles stated by the learned judge have been discussed.

In *Campbell v. Fleming*, 1 Ad. & E. 40, it was held that one who was induced to purchase stock in a mining company by fraudulent representations as to its value might repudiate the transaction, if he would do so as soon as he was informed of the fraud.

In *Duvergier v. Fellows*, 5 Bing. 248, it was held that a contract made between two persons who were engaged in getting up an illegal and fraudulent enterprise, and made for the purpose of carrying on such enterprise, could not be enforced at law. Chief Justice Best says of the case: "It is manifest that the scheme in which the parties to this action were engaged was one of those bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited that has been most injurious to commerce and to the morals of the people." He further says

that such schemes are fraud-traps and injurious to the public welfare, and that the forming of them is indictable at common law.

These remarks are applicable to many transactions that have occurred in this country, and if the jury found them applicable to this case, there would be no ground to say that there was no legal evidence to sustain such finding. The weight of the evidence is not now before the court.

The case of *Bagshaw v. Seymour*, 4 Com. B., N. S., 873, was an action against the chairman of the directors of an Australian gold-mining company. By a false representation as to the amount of money which they had paid in, they procured the committee of the stock exchange to place the stock on their list, and thus give it character and credit. The plaintiff was thereby induced to buy some shares of one Barclay on the stock exchange. It was held by the common bench that the defendant was liable to the plaintiff on the ground of this fraudulent representation made to the directors of the stock exchange. The case was carried by the defendant to the house of lords, and there abandoned. The doctrine established in the case was that all the associates who had united in the fraudulent representation to the public were equally liable to a purchaser whom they had thus deceived and injured.

In *Bedford v. Bagshaw*, 4 Hurl. & N. 538, the court of exchequer held the same doctrine in application to another Australian gold-mining company. Pollock, B., remarked: "If a director of a company, one of the persons who puts the shares forth into the world, deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood, I should feel no difficulty in saying that in such case an action is maintainable."

In *Clarke v. Dickson*, 6 Com. B., N. S., 453, where there was a sale of shares in a lead and copper mining company, the directors in their prospectus made a representation that the property had been purchased at a certain large price, when in truth it had been purchased by one of the directors at a very insignificant price. It was held that a purchaser could recover of one of the directors, although the false representations were not the sole inducement to him to purchase.

In *Watson v. Earl Charlemont*, 12 Q. B. 856, all the judges concurred in holding that if an untrue representation appears to be the act of the body of directors, and it is fraudulently

made, the members are all answerable for the fraud; also, that if an untrue statement is published which is likely to induce a party to enter into a contract, and he does so, the person who made the false statement is bound, independently of any proof that the other party was actually induced by it to contract, and that *prima facie* it will be taken that he was influenced by it.

In *Jarrett v. Kennedy*, 6 Com. B. 319, there had been a fraudulent suppression of facts by a majority of a railway committee. It was held that the plaintiff, who had subscribed for some shares and paid the deposit to the company, might recover it back from one of the committee in an action for money had and received.

In the light of these cases, it is apparent that the representations alleged to be false were material, and that there was evidence sufficient in law to authorize the jury to find that they were false and fraudulent in material particulars; so that the court cannot set aside the verdict on the ground that in these respects there is no evidence sufficient in law to support it.

But it is contended that the defendant contracted with the plaintiff as the agent of other persons, and that there is no evidence which is sufficient in law to authorize a verdict against him on the ground that he was the principal.

On this point, the plaintiff testified that when he proposed to buy some stock the defendant answered, "I think I can let you have some," or "can buy you some," and in speaking of the price, said he would probably get it at a dollar and a half per share. He also said, "It is one of the best properties in Colorado. It is very valuable. They are going right to work upon it. It is all right. You had better buy some of the stock and get your friends to do so." The jury would be authorized to consider these expressions as evidence tending to show a personal interest in the sale rather than disinterested friendship. They might also consider the fact that the defendant was interested to get back the sum of ten thousand five hundred dollars which he had advanced, rather than make sales of stock for the benefit of his associates. It appeared also in the plaintiff's evidence that the transfer of the certificate to him was signed by Durham as the defendant's attorney, and that the money was paid by him to the defendant, who did not profess to receive it as agent, Durham corroborating him by

stating that he made the transfer by the defendant's direction and as his attorney.

This testimony is sufficient in law to authorize the finding that the defendant acted as principal at the sale. None of it tends to show that he made the sale as the agent of Sargent and Pierce. The plaintiff testifies that he did so, and paid the money to them. But there is nothing to corroborate this statement, and its credibility was for the jury to decide upon.

It is also contended that the plaintiff had knowledge of the condition of the company to such an extent that he was not deceived. So far as this depends on the statements of Poole, the defendant, the jury might not be satisfied with them. The plaintiff admits that he did not suppose the property cost the company five hundred thousand dollars. But they did not represent that it cost over four hundred thousand dollars. He also says he did not suppose that it was put in at the par value of the shares. It was never represented that it was put in at that price. Poole also told him that the stock would be a dollar and a half per share. But that is a mere statement of the price at which Poole was ready to sell it, or at which he could probably get it. All this is far from including the material facts in the case.

It is not necessary to refer to all the details of the instructions given to the jury. It is sufficient to say that they were in conformity with the decisions above referred to, and with the established principles of law as recognized both in England and this country.

Exceptions overruled.

DECISION ON MATTER OF DISCRETION IN LOWER COURT is not revisable on error: *Riddle v. Gage*, 75 Am. Dec. 151, and note 153; *Seabury v. Stewart*, 58 Id. 254; unless there has been a flagrant abuse of such discretion: *Moody v. Fleming*, 48 Id. 210; *Winslow v. Railroad Co.*, 77 Id. 519; *Turnpike Road Co. v. Loomis*, 88 Id. 311, and note 320.

PERSON CONTRACTING AS AGENT WILL BE PERSONALLY RESPONSIBLE when at the time of contracting he does not disclose the fact of his agency, but treats with the other party as being himself the principal: *Bickford v. First Nat. Bank*, 89 Am. Dec. 436; *Hall v. Crandall*, 89 Id. 64, and note 69.

FALSE REPRESENTATION, WHAT IS: *Page v. Parker*, 80 Am. Dec. 172, and cases collected in note 183; *Converse v. Blumrich*, 90 Id. 330.

STATEMENT FALSE IN FACT UTTERED FOR FRAUDULENT PURPOSE which is accomplished has the whole effect of fraud, although the person uttering the statement believed it to be true: *Woodruff v. Gomer*, 89 Am. Dec. 477.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in *Wetherbee v. Potter*, 99 Mass. 360.

CASWELL v. BOSTON AND WORCESTER R. R. Co.

[98 MASSACHUSETTS, 194.]

WHERE, BY REASON OF MISPLACEMENT OF SWITCH BY SERVANT OF RAILROAD COMPANY, a train is diverted from the main track of the railroad to a side-track, and there collides with other cars, and imperils passengers on an adjoining platform, it is competent for a jury to find that the omission to replace the switch was culpable negligence.

QUESTION WHETHER PASSENGER IS BOUND TO WAIT IN STATION-HOUSE OF RAILROAD COMPANY UNTIL ARRIVAL OF TRAIN at a platform provided for passing to trains, or may cross over an intervening side-track and stand on the platform, depends, in the absence of directions thereto, upon what is a reasonably safe and prudent course for him to pursue, in determining which the jury may consider what is the usage of passengers there, and whether such usage is known to and permitted by the company.

VERDICT IN ACTION AGAINST RAILROAD COMPANY FOR INJURY TO PASSENGER IS WARRANTED, where the passenger, while awaiting a train in a proper place, and believing that she was in danger from the approach of the train in an unexpected direction by reason of the switch being misplaced through culpable negligence of servants of the company, became alarmed, and in running away to escape the apprehended peril, tripped over the rail of the track on which she was running, fell, and was injured, although by running she was brought into a more perilous position than she was in had she remained where she was standing.

ACTION of tort for the recovery of damages for injuries by a fall alleged to have been caused by the negligence of the defendant. The injuries for which the action was brought occurred at Wellesley station, on the defendant's railroad, at which station the plaintiff bought a ticket for transportation of herself from there to Boston. The station-house was separated by a side-track from a platform provided for passing to trains, and the company had established no regulations or directions as to when and how passengers should enter the train for Boston, or where they should remain while waiting for it. It appeared from the testimony on the trial that after procuring her ticket, the plaintiff, with other passengers, crossed over from the station-house to the platform, and stood there awaiting the arrival of the train. While thus standing, the approaching train left its usual and safe track, by reason of the displacement of a switch by a servant of the railroad company, and ran on the side-track immediately connected with the platform, and the passenger on the platform ran off in various directions in great excitement and confusion. The plaintiff ran diagonally across the side-track, and in doing so tripped over the rail of the track, fell, and received the injuries complained of. The defendant's answer denied that the plain-

tiff was under the defendant's control and direction while standing on the platform, and alleged that, being there in a safe position, she carelessly left it, and in running off fell, and that any injuries resulting thereby were due to her own negligence. Negligence in the management of the switch was also denied. The concluding instructions to the jury were, that if "the plaintiff met with an injury while trying to escape from a real and not imaginary danger, and using care in the mode by which she attempted to escape, and if the injury would not have happened but for the defendant's fault, and did happen by reason of it, without want of care on her part while she was on the track or directly after she left it, and before she was out of actual danger, then she might recover, although the immediate cause of the injury might have been the striking of her foot on the rail or sleeper while running, and although she would not have been hurt if she had remained on the platform." Verdict for the plaintiff, and the defendant alleged exceptions.

G. S. Hale, for the defendant.

G. A. Somerby, for the plaintiff.

By Court, BIGELOW, C. J. We are of opinion that the instructions in this case were well adapted to the facts in evidence, and were in all respects sufficient to give the jury an adequate understanding of the rights and duties of the defendants. We do not see that they do not, in all essential particulars, conform to the principles stated with great accuracy and fullness in *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227 [85 Am. Dec. 700].

The evidence was sufficient to warrant a jury in finding, — 1. That the plaintiff seasonably, and without undue haste, passed across the track of the railroad, and took a proper position on the platform provided by the defendants for passengers who were about to take the train that was approaching; 2. That while standing there in a suitable place, where passengers were accustomed to be in order to enter the train, she had good reason to believe that she was in actual peril of injury by reason of the approach of an engine in an unexpected direction, in consequence of the displacement of a switch; 3. That this reasonable apprehension of peril and injury was adequate and sufficient to excite alarm, and to induce the plaintiff to make efforts to escape as rapidly as

possible; 4. That this displacement of the switch, and the consequent approach of the engine in such manner as to excite alarm and apprehension of injury, were owing to the culpable negligence of the servants of the defendants; and 5. That this negligence was the efficient cause of the plaintiff's injuries.

Exceptions overruled.

DEGREE OF CARE AND DILIGENCE REQUIRED of common carrier of passengers: *Johnson v. Winona etc. R. R. Co.*, 88 Am. Dec. 83, and cases collected in note 88; carrier is not insurer of safety of passengers, but is liable for the utmost care and diligence: *Sawyer v. Hannibal etc. R. R. Co.*, 90 Id. 382; *Deyo v. New York Cent. R. R. Co.*, 88 Id. 418, and note 427. In an action against the carrier for injury to a passenger, the plaintiff must affirmatively establish negligence on the part of the defendant, its servants or agents, and freedom from negligence on his own part: *Id.*; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700; but that contributory negligence is a matter of defense, see *Milwaukee etc. R. R. Co. v. Hunter*, 78 Id. 699, and note 706.

PASSENGERS MUST TAKE NOTICE OF ESTABLISHED CUSTOM OF RAILROADS, and use reasonable care to avoid accidents: *Southern R. R. Co. v. Kendrick*, 90 Am. Dec. 332, and cases collected in note 343.

CARE REQUIRED OF RAILROAD COMPANY TOWARDS PURCHASERS OF TICKETS while waiting for train at station: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700. Compare *Indiana Cent. R. R. Co. v. Hudelson*, 74 Id. 254.

PURCHASER OF TICKET IS BOUND TO COMPLY WITH ALL REASONABLE RULES AND ORDERS of railroad company or their agents as much when going to the cars from the station-house, or from the cars to a place of safety beyond the railroad track, as when actually on board the train, and while the transit continues: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700.

PERSON HOLDING TICKET ABOUT TO TAKE TRAIN, right of, to cross side-track: *Indiana Cent. R. R. Co. v. Hudelson*, 74 Am. Dec. 254.

PASSENGER STANDING ON PLATFORM may recover for injury from derailment when: *Zemp v. Wilmington etc. R. R. Co.*, 64 Am. Dec. 763.

THE PRINCIPAL CASE IS CITED in *Mayo v. Boston etc. R. R. Co.*, 104 Mass. 141, as an instance in which the arrangements of the railroad company for the accommodation of persons in taking or leaving the cars, or crossing the track, afforded a reasonable justification to the party for being upon the track, and thus exposed to the dangers incident to such a position; and is thus to be distinguished from decisions made upon the ground that when one voluntarily puts himself in a place of exposure to injury, without some reason of necessity or propriety to justify him in so doing, and injury happens to him in consequence of his being in that place, he is not allowed to recover for such injury, although he may be able to show negligence in the conduct of the other party. A similar distinction is made in *Forsyth v. Boston etc. R. R. Co.*, 103 Id. 514, citing the principal case.

TUTEIN v. HURLEY.

[98 MASSACHUSETTS, 211.]

INJURY NOT ACTIONABLE WHEN CAUSE NOT PROXIMATE. — The plaintiff left his hoisting-shears where he had last used them, secured by two guys. A stevedore cast loose the front guy and wound it around one of the shears, leaving it in that position. Some boys swung upon the rear guy, causing the shears to fall and break in pieces. It appeared that they would not have fallen, except by the swinging of the boys, and that the swinging of the boys would not have overturned them if the front guy had been refastened. *Held*, that the stevedore was not liable for the injury to the shears.

ACTION of tort for the destruction of a pair of hoisting-shears. The facts appear in the head-note. Finding in favor of the defendant, and the plaintiff alleged exceptions.

P. Ayer, for the plaintiff.

J. C. Park, for the defendants.

By Court, BIGELOW, C. J. The injury to the plaintiff's property was not caused by the act of the defendants in any such sense as to render them liable in this action. The most that can be said is that their act remotely contributed to the accident. But to support an action, it must appear that the proximate cause of the injury was the misfeasance of the defendants.

Exceptions overruled.

INJURY TO BE ACTIONABLE MUST BE NATURAL AND PROXIMATE consequence of the act or omission complained of: *Patch v. City of Covington*, 66 Am. Dec. 186; *Worcester v. Great Falls Mfg. Co.*, 66 Id. 217, and cases collected in note 219; *Clark v. Pacific R. R.*, 90 Id. 458; and see *Davis v. Fish*, 48 Id. 387; *Harrison v. Berkley*, 47 Id. 578; *Donnell v. Jones*, 48 Id. 59.

THE PRINCIPAL CASE IS CITED in *Lane v. Atlantic Works*, 111 Mass. 141, as sustaining the rule that in an action to recover for injuries caused by the defendant's negligence, to which the fault of another person contributed, the defendant's liability is not affected by the fact that the fault of such person was not negligence, but voluntary wrong-doing, if it was conduct which the defendant should have apprehended and provided against.

REED v. RICHARDSON.

[98 MASSACHUSETTS, 216.]

ANY USAGE, IN ORDER TO BE OPERATIVE AS SHOWING FULFILLMENT OF CONTRACT, must be reasonable, and be of such a nature that it does not in any degree tend to controvert the well-established rules of law.

USAGE OF PORT, THAT IN ORDER TO CONSTITUTE DELIVERY OF GOODS BY CARRIER BY WATER the consignee or his agent must receipt therefor, is both unreasonable and illegal, and evidence of the usage is inadmissible in defense to an action against the consignee for loss of the goods through his negligence.

CONTRACT to recover the value of three bales of cotton alleged to have been lost through the negligence of the defendants, to whom the cotton was consigned. The plaintiffs shipped nine bales of cotton, only six of which were received at the defendants' warehouse, and the issue was, whether the master of the vessel had delivered the whole number to the defendants. The master took no receipt for them, and the defendants offered no evidence of a usage of the port making a receipt by the consignee or his agent necessary to constitute a delivery of water-borne goods by the carrier, and that until then the carrier's liability continued. This evidence was excluded, and the jury found for the plaintiffs. The defendants alleged exceptions.

R. M. Morse, Jr., and R. Stone, Jr., for the defendants.

J. B. Thayer and A. G. Sedgwick, for the plaintiffs.

By Court, BIGELOW, C. J. We infer from the statement in the bill of exceptions that the liability of the defendants for the value of the cotton turned on the question whether it had ever been delivered to them by the carrier who brought it to Savannah in a sloop, and that they sought to avoid this liability by evidence of the existence of a well-established usage in that city that in order to constitute a delivery of goods by a carrier by water it was necessary that a receipt for them should be given by the consignee or his agent, it being conceded that no such receipt was taken by the carrier for the cotton, the value of which the plaintiff seeks to recover in this action. If this is a correct statement of the position of the case at the trial, we think it very clear that the evidence of the usage was inadmissible, upon two grounds.

In the first place, if the usage is to be taken without qualification, it would relieve parties from responsibility for property consigned to them, although there might be evidence

offered from which a jury would be authorized to infer that the property had been received by the consignee or his agent. In other words, the evidence offered tended to substitute a particular usage as positive and absolute proof of a fact, to the exclusion of all other evidence going to establish the same fact. Taken literally, the proposition was to show that by the usage at Savannah there could be no evidence of delivery of goods which had been water-borne, unless the carrier could show that he had taken a written receipt for them from the consignee or his agent. It is too plain for argument that no usage can be valid or be recognized as affecting the rights of parties in a court of law, the effect of which is to shut out legal and competent evidence of any facts material to the trial of an issue.

But if this interpretation of the usage gives a broader application to it than was intended to be made of it at the time by the counsel for the defendants, we are of the opinion that there is another decisive objection to it, which rendered evidence of its existence incompetent. Any usage in order to be operative as showing a fulfillment of a contract must be reasonable, so that it may fairly be presumed that parties entered into their contract with reference to it; and it must also be of such a nature that it does not in any degree tend to controvert the well-established rules of law: *Dickinson v. Gay*, 7 Allen, 34 [83 Am. Dec. 656]; *Seccomb v. Provincial Ins. Co.*, 10 Id. 310-317; *Dodd v. Farlow*, 11 Id. 426 [87 Am. Dec. 726]. It seems to us that the usage in question is both unreasonable and illegal. It is unreasonable because it imposes on a carrier the burden of procuring an act to be done by another person the performance of which he has no power to compel or enforce, or which from design or accident on the part of others it may be difficult or impossible for him to cause to be accomplished. It is no answer to the objection to say that if, through no fault of his own, the carrier cannot comply with the usage, he may then prove delivery of the property in some other manner. This does not relieve the difficulty, because in the contingency supposed he would be obliged to show the existence of facts sufficient to excuse a non-compliance with the usage before he could be allowed to prove by the ordinary legal evidence that he had fulfilled his contract. No usage to which such a consequence necessarily attaches can be deemed to be consistent with the principle, that no unusual or disproportionate duty or burden can be

thrown on one of the parties to a contract by local usage or custom.

The usage in question is also objectionable and invalid, for it tends to contravene the fixed rule of law. By the common law a carrier is discharged of his duty when he has made an actual or constructive delivery at the proper time and place. Doubtless usage may regulate the manner of delivery or the time when and the place where it may be made. This would be within the legitimate range of the operation of a usage. But it cannot prescribe or determine that acts which the law declares to be a delivery shall not be sufficient to constitute it. Such was the effect proposed to be given to the evidence in the case at bar. Delivery at the appointed time and place would not have proved a fulfillment of the contract if the usage was to have effect.

Exceptions overruled.

USAGE REPUGNANT TO TERMS OF CONTRACT is inadmissible to control it: *Boardman v. Sprague*, 90 Am. Dec. 196; *Dickinson v. Gay*, 83 Id. 656; *Boon v. Steamboat Belfast*, 88 Id. 761; but usage may be considered in construction of contract: *Johnson v. Concord R. R. Co.*, 88 Id. 199; but will not be permitted to conflict with settled rule of law: *Dodd v. Farlow*, 87 Id. 728; *Dickinson v. Gay*, 83 Id. 656, and note 664.

USAGES AS AFFECTING CONSTRUCTION OF CONTRACT OF INSURANCE: *Merchants' Ins. Co. v. Shillito*, 86 Am. Dec. 491, and cases collected in note 500.

USAGE IN PARTICULAR PLACE CANNOT ALTER GENERAL COMMERCIAL USAGE of the world: *Strong v. King*, 85 Am. Dec. 336.

USAGE CANNOT ABSOLVE CARRIER FROM ORDINARY DUTIES: *Cox v. Peterson*, 68 Am. Dec. 145, and note 148.

WHAT NECESSARY TO CONSTITUTE GOOD USAGE: *Steele v. McTyer*, 70 Am. Dec. 516, and note 523.

THE PRINCIPAL CASE IS CITED in *Porter v. Hills*, 114 Mass. 111, to the point that a usage to be binding must be universal, uniform, and of sufficiently long continuance to afford a presumption that it was known by the party to be affected by it.

SQUIRE v. WESTERN UNION TELEGRAPH COMPANY.

[93 MASSACHUSETTS, 282.]

LIABILITY OF TELEGRAPH COMPANY FOR NEGLIGENCE IN DELIVERING MESSAGE. — The blanks of a telegraph company contained certain terms and conditions, limiting to a small sum the liability of the company for error or delay in the transmission or delivery of any message. The company received a message written upon one of these blanks, addressed to a place on the line of a second company, collected pay for its transmission the whole distance, forwarded it to the terminus of its own line, and

there delivered it to the second company, which forwarded it to its destination. *Held*, that the second company could not avail itself of the terms and conditions in the blank limiting the liability of the first company, and thus escape liability for negligence in delivering the message.

MEASURE OF DAMAGES FOR NEGLIGENCE OF TELEGRAPH COMPANY TO SEASONABLY DELIVER MESSAGE agreeing to accept an offer to sell goods at a certain price, in consequence of which the bargain is lost, is the additional sum which the plaintiff would have been compelled to pay at the same place to obtain the same quantity of similar goods.

ACTION of tort for negligence in delivering telegram. The defendant had a line of telegraph to Buffalo from Albany, where it connected with a line of the American Telegraph Company running from Albany to Boston. A firm owning goods in Buffalo had a correspondence with the plaintiffs in Boston, offering to sell the same, and asking the plaintiffs to reply by telegram, which they did, naming the price. The Buffalo firm answered by telegram, declining to sell for that price, but naming another which they would accept for the lot delivered in the cars at Buffalo. The plaintiffs then prepared a reply, accepting the last offer, writing it on a blank of the American Telegraph Company, beneath printed "terms and conditions," limiting to a sum of five dollars the liability of the company for error or delay in the transmission or delivery of any unrepeatable message, and providing that "no liability is assumed for any error or neglect by any other company over whose lines this message may be sent to reach its destination." The plaintiffs addressed this reply to the Buffalo firm, delivered it at the office of the American Telegraph Company in Boston, on Saturday evening, and paid for its transmission as an unrepeatable message the whole way to Buffalo. The company sent the message, and it arrived in Buffalo on the same evening; but through the negligence of the defendant's agent at that place, it was not delivered to its address until nearly noon on the following Monday. Until eleven o'clock on Monday the Buffalo firm had been willing to close the bargain with the plaintiffs, but not having received a reply at that hour, they sold and delivered the goods to another party. The plaintiffs offered to show that at the time they sent the message, and also on and through the following Monday, the market price of such goods in Buffalo was higher than the price named by the Buffalo firm, and during the same period was higher at Boston than such price, increased by what it would have cost to transmit the goods from Buffalo to Boston; and that it continued to rise at both places from

that time forward until beyond the time required to bring the goods to Boston and sell them; and also that they had made contracts for the sale of goods which they were bound to perform, and were relying on a part of those goods to enable them to do so, and by reason of not getting them were compelled to buy others at a much higher rate to take their place; and for these things they claimed damages, and offered to prove and fix the amount by evidence. But the court ruled, *pro forma*, 'that any profit which the plaintiffs might have realized by the sale of the goods which were the subject of the message was not an element of damage, and nothing could be recovered on that account; and that upon the offer and claims as made by the plaintiffs, and upon the conditions under which the dispatch was sent, they could in no event recover more than five dollars.' A verdict was taken for this amount, and the plaintiffs alleged exceptions.

A. A. Ranney, for the plaintiffs.

G. S. Hale, for the defendant.

By Court, BIGELOW, C. J. The only question open on these exceptions is as to the rule by which the plaintiffs' damages are to be measured.

We think it clear that they are not limited by any special contract between the parties. There is no evidence that any such contract was entered into. The terms and conditions on which the message was received and transmitted by the company at Boston to the defendants at Albany do not purport on their face to be intended to apply to the service which might be performed by any other company in the transmission of the message beyond the terminus of the line of the company to which it was first delivered. Not only are these terms and conditions expressly limited to the company first receiving the message, but it is also distinctly stipulated that no liability is assumed for any error or neglect by any other company by which the message may be sent in order to reach its destination, clearly indicating an intent to apply the special terms and conditions to their own contract only, and to the service which they undertook to perform, and not to extend them beyond their own line so as to qualify or control the liability which other companies might assume in the transmission of the message. No evidence was offered at the trial to show that the defendants had in any way restricted their general liability for the service which they undertook to render; or

that they had ever authorized the company in Boston to enter into special stipulations in their behalf; or that the plaintiff had any notice or knowledge of their usages or mode of doing business, or that they did not intend to assume the liability which the law affixed to the employment which they held themselves out to the public as ready to carry on. The case therefore stands as an action for damages for breach of a contract entered into by the defendants through their authorized agent, to which no special stipulations or restrictions on their liability were attached, and on which they are to be held responsible according to the general rules of law.

These rules, in their application to damages in actions of this nature, are well settled and familiar. A party who has failed to fulfill a contract cannot be held liable for remote, contingent, and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is, that damages of such a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of parties when they agreed together. A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform, and to the compensation paid and received therefor. The practical rule, founded on a wise policy, and at the same time consistent with good sense and sound equity, is, that a party can be held liable for breach of a contract only for such damages as are the natural or necessary and the immediate and direct results of the breach,—such as might properly be deemed to have been in contemplation of the parties when the contract was entered into,—and that all remote, speculative, and uncertain results, as well as possible profits and advantages and other like consequences which might have arisen from the fulfillment of the contract, must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach: *Fox v. Harding*, 7 Cush. 516; *Cutting v. Grand Trunk R'y Co.*, 13 Allen, 381–384, and cases cited. In the latter case it was held that a carrier who had negligently de-

layed to transport and deliver goods intrusted to him was liable in damages for the difference in their value at the time when and place where they ought to have been delivered, and their market value at the same place on the day when they were delivered. This was held to be the measure of damages, because such a change in value was the direct result of the delay in performing the contract, and might well be supposed to have been in contemplation of the parties when the contract was made. We can see no reason why an analogous rule is not applicable to the case before us. The defendants as a contracting party are liable for the injury actually caused by their breach of duty. There is nothing in the nature of the business which they undertake to carry on that should exempt them from making compensation for any neglect or default on their part: *Ellis v. American Telegraph Co.*, 13 Allen, 226. The only question, then, is as to the effect of the application of the general rule of damages already stated to the contract between the parties. This necessarily depends on the subject-matter. The defendants undertook to transmit a message which on its face purported to be an acceptance of an offer for the sale of merchandise. The agreement was to transmit and deliver it with reasonable diligence and dispatch, having reference to the ordinary mode of performing similar service by persons engaged in the same business. The natural consequence of a failure to fulfill the contract was, that the party to whom the message was addressed, not receiving a reply to his offer to sell the merchandise in due season, would dispose of it to another person; that the plaintiff might be unable to procure an article of like kind and quality at the same price, and in order to obtain it would be obliged to pay a higher price for it in the market than he would have paid if the prior contract for its purchase had been completed by the seasonable delivery of his message by the defendants. The sum, therefore, which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price which they agreed to pay for the merchandise by the message which the defendants undertook to transmit, if it had been duly and seasonably delivered in fulfillment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased the like quantity and quality of the same species of merchandise. The case must be tried anew, and if it is found that the defendants did not fulfill their contract,

the damages must be assessed according to the rule above stated.

Exceptions sustained.

TELEGRAPH COMPANY MAY SPECIALLY LIMIT THEIR LIABILITIES, but will not be protected from the consequences of gross negligence: *Wann v. Western Union Tel. Co.*, 90 Am. Dec. 395, and see note 399.

TELEGRAPH COMPANY RECEIVING MESSAGE IN ITS OFFICE IS BOUND TO TRANSMIT IT with impartialty and good faith in the order of time in which it was received: *Western Union Tel. Co. v. Ward*, 85 Am. Dec. 462.

GENERAL DUTIES AND LIABILITIES OF TELEGRAPH COMPANIES: *Birney v. Printing Tel. Co.*, 81 Am. Dec. 607, and extended note 613.

TELEGRAPHIC MESSAGES AS EVIDENCE: *Commonwealth v. Jeffries*, 83 Am. Dec. 712.

DAMAGES FOR BREACH OF CONTRACT: *Griffin v. Colver*, 69 Am. Dec. 718, and extended note 725.

THE PRINCIPAL CASE IS CITED and approved as to the rule of damages stated in the second point in the *syllabus*, in *True v. International Tel. Co.*, 60 Me. 25; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 568; and is commented on and distinguished as to this point in *Beaupré v. Pacific etc. Tel. Co.*, 21 Minn. 158; *Graham v. Western Union Tel. Co.*, 10 Am. L. Reg., N. S., 329 (Or.); *Baldwin v. United States Tel. Co.*, 45 N. Y. 750; *Kiley v. Western Union Tel. Co.*, 39 Hun, 163. It is cited to the point that where the lines of two telegraph companies are coterminus, each company, in the absence of evidence of a special agreement or arrangement, either with the sender of a message or between each other, will be liable for its own acts, but not for the acts and defaults of the others, in *Baldwin v. United States Tel. Co.*, 45 N. Y. 749; and is distinguished in *Grinnell v. Western Union Tel. Co.*, 113 Mass. 305, as being a case in which there was no regulation limiting the liability of the company against which the action was brought.

SQUIRE v. NEW YORK CENTRAL RAILROAD Co.

[98 MASSACHUSETTS, 239.]

IN ABSENCE OF STATUTORY PROVISIONS UPON SUBJECT, COMMON CARRIERS MAY LIMIT THEIR LIABILITY by special contract against all risks but their own negligence or misconduct.

OWNER OR SHIPPER OF LIVE-STOCK MAY AGREE WITH CARRIER, IN CONSIDERATION OF REDUCED RATE OF FREIGHT, to assume the risk of injuries to the animals "in consequence of heat, suffocation, or of being crowded," during transportation by the carrier, and the parties will be bound by the agreement.

ACTION of contract to recover the value of a number of hogs suffocated by crowding while being carried by the defendant from Suspension Bridge to Albany. The defendant's answer denied negligence, and alleged negligence of the plaintiffs as the cause of the injury, and that the hogs at the time were

being carried under a special contract exempting the defendant from liability for injury from crowding or suffocation. The plaintiffs bought the hogs in question in Chicago, and sent one Sullivan, a drover, for the purpose of attending them to Boston. At Suspension Bridge, on the route, they were discharged into the stock-yard of the defendant, and cars were brought to the yard, and the hogs loaded into them. The ticket-master gave Sullivan a pass, and at the same time handed to him a written contract, saying that he must sign it, and asked him to sign it with the names of the plaintiffs, which he did without express authority from them. The contract was also signed by the station agent, and limited the defendant's liability in several important particulars, and among other things, for injury to the hogs from suffocation. Some of the hogs were suffocated before reaching Albany, and this action was brought to recover their value. The defendant introduced in evidence the special contract signed by Sullivan, and the judge ruled that it was a sufficient defense to the action, and directed a verdict for the defendant. The plaintiffs alleged exceptions.

A. A. Ranney, for the plaintiffs.

E. Merwin, for the defendant.

By Court, GRAY, J. The law is now well settled that, in the absence of any statute upon the subject, common carriers may by special contract limit their liability, at least against all risks but their own negligence or misconduct: *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 382, 383; *York Co. v. Central R. R. Co.*, 3 Wall. 107; *Peek v. North Staffordshire R'y Co.*, 10 H. L. Cas. 493, 494; *Peninsular and Oriental Steam Navigation Co. v. Shand*, 3 Moore P. C., N. S., 293, 294; *Judson v. Western R. R. Co.*, 6 Allen, 489, 490 [83 Am. Dec. 646]; *Ellis v. American Telegraph Co.*, 13 Allen, 234.

The special contract on which the defendants rely declares that they transport cattle and other live-stock "only at first-class rates as per tariff, excepting in the following cases, viz.: where they transport them at a reduced rate, in consideration of the owner or shipper assuming certain risks, as specified below"; and that, in consideration of their agreement to transport four car-loads of hogs from Suspension Bridge to Albany at the reduced rate, the other party agrees that their liability shall be limited in various respects, which require separate consideration.

The stipulation that they should not under any circumstances be held liable beyond the sum of two hundred dollars for injury to or loss of any single animal, was a proper and lawful mode of securing a due proportion between the amount for which they might be responsible and the freight which they received, and of protecting themselves against extravagant and fanciful valuations: *Clay v. Willan*, 1 H. Black. 297; *Harrison v. London, Brighton, and Southcoast R'y Co.*, 2 Best & S. 122; *Orange County Bank v. Brown*, 9 Wend. 115 [24 Am. Dec. 129]. The provision by which the owner or shipper agrees to take the risk of injuries to the animals in consequence of their own intrinsic defects differs but little, if at all, from the rule of law in the absence of any contract: *Smith v. New Haven and Northampton R. R. Co.*, 12 Allen, 531 [90 Am. Dec. 166]. The putting upon the owner the risk of loss or damage by delay to things so subject to extraordinary injury or expense from that cause as live animals was certainly not unreasonable.

The owner also agrees to take the risk of injuries which the animals may receive "in consequence of heat, suffocation, or of being crowded, or on account of being injured, whether such injury shall be caused by the burning of hay, straw, or any other material used for feeding said animals, or otherwise." It might not be easy, and in this case is not necessary, to define with accuracy the limits of the operation of the latter part of this clause. It could not, consistently with American decisions of high authority, be held to imply an exemption of the carriers from the consequences of their own negligence or misconduct: *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 383, 384; *Sager v. Portsmouth R. R. Co.*, 31 Me. 228 [50 Am. Dec. 659]; *Wells v. Steam Navigation Co.*, 8 N. Y. 375. Neither does this case call for any opinion upon the validity or effect of the subsequent distinct stipulations that the owner shall take all risk of injuries happening in consequence of defects in the floor, frame, or doors of the cars, and that the person in charge of the animals shall take all risk of personal injury from whatever cause, whether negligence of the carriers or their agents, or otherwise.

It is the first part of the clause just quoted which is immediately involved in this case, by which the owner or shipper agrees to take the risk of injuries to the animals "in consequence of heat, suffocation, or of being crowded." He also agrees to load and unload the animals at his own risk, to ex-

amine the cars on which they are to be carried, and to go or send one or more men in the same train (who are to be carried free of fare), to take charge of them. The only cause of injury to the plaintiffs' hogs, which the evidence offered at the trial tended to prove, was suffocation by overcrowding and want of ventilation. We are unable to see anything contrary to the policy of the law in permitting the parties to agree together that, in consideration of the payment of a reduced rate of freight, a person who delivers property of this nature to a carrier, to be laden and transported under the immediate charge of himself or his agent, in cars which he has an opportunity of examining, should bear the risk of injuries resulting from the size and mode of construction of the cars and the manner of stowing the property. A similar contract has been held valid and binding to this extent by the supreme court of Vermont: *Kimball v. Rutland and Burlington R. R. Co.*, 26 Vt. 247 [62 Am. Dec. 576]. And in New York, where the contract in question was made and to be performed, and by the law of which, as was agreed at the argument, the rights of the parties are to be regulated, contracts exactly like this have been held by the court of appeals to be lawful and conclusive, both as to the risks to which the animals are exposed and as to injuries to the person traveling in charge of them: *Bissell v. New York Central R. R. Co.*, 25 N. Y. 442 [82 Am. Dec. 369], and cases cited.

The English cases cited for the plaintiffs arose under the statute of 17 & 18 Vic., c. 31, sec. 7, by which carriers are allowed to make such special contracts only as shall be adjudged to be just and reasonable by the court before which the question may arise: *Peek v. North Staffordshire R'y Co.*, 10 H. L. Cas. 473. In *Gregory v. West Midland R'y Co.*, 2 Hurl. & C. 944, the contract was held by its terms to exempt the carriers from all responsibility whatever, and to be therefore unreasonable. In *Allday v. Great Western R'y Co.*, 11 Jur., N. S., 12, the contract, which was held to be unreasonable, undertook to exempt the carriers, among other things, from risks of "overcarriage," or "any other cause whatsoever"; and the damage sued for was occasioned by carrying the cattle beyond their destination. Even in that case, Lord Chief Justice Cockburn said: "If it could really be shown that the company had undertaken to carry the cattle at lower rates than they were legally entitled to, in consideration of the owner being content to take his chance of the due arrival and

safety of his property, I think under such circumstances they would have been protected." And in *Pardington v. South Wales R'y Co.*, 1 Hurl. & N. 392, it was adjudged that a clause like that now before us was reasonable, and exempted the carriers from liability for loss by suffocation of cattle put by them, not into proper cattle trucks, but into vans closing with lids, one of which became closed on the journey while the servant traveling in charge of the cattle was in another car: See also *Beal v. South Devon R'y Co.*, 5 Hurl. & N. 875; S. C., 3 Hurl. & C. 337.

In the case at bar, the evidence introduced by the plaintiffs showed that the agent sent by them to attend the hogs on their transportation, after receiving notice from the superintendent of the defendants' yard that it was his turn to load, permitted their laborers to load the hogs without first himself examining the cars, observed the overcrowding and want of ventilation after the loading was finished, and ten or fifteen minutes before the starting of the train, yet did not mention it to the superintendent or any other officer of the defendants, but procured a pass at the ticket-office, there signed this agreement in the name of one of the plaintiffs, supposing it to be some contract about the hogs, without reading it or informing himself of its contents, went upon the train, and proceeded on the journey, and although he perceived the hogs to be suffering from the confinement, spoke to the conductor about it, and asked at Rochester to have them transferred to other cars, yet on being told there were no other cars there, did not insist on having the cars containing the hogs detached and left, but went on with them to Albany. Even if he had no express authority from the plaintiffs to sign any contract relating to their transportation, he was the person in charge of the property, and the only one with whom the defendants could make the necessary arrangements, and stood towards them for this purpose in the position of an owner: *York Co. v. Central R. R. Co.*, 3 Wall. 113. There is no evidence of any fraud on the part of the defendants or their agent or clerk, such as representing that the paper was of no consequence, as in *Simons v. Great Western R'y Co.*, 2 Com. B., N. S., 620, cited for the plaintiffs.

Upon these facts, we are of opinion that this action cannot be maintained. The contract so signed, by which the defendants agreed to carry the plaintiffs' property at a reduced rate (of which the recital in the contract itself is sufficient evi-

dence) in consideration of being exempted from certain risks, and such exemptions being lawful and reasonable, at least to the extent involved in this case, and this contract having been acted on by the defendants in transporting the animals, and by the plaintiffs' agent in accompanying them in the transportation, must be treated as constituting the only contract or relation between the defendants and the plaintiffs, by the lawful provisions of which both parties were bound. The plaintiffs became liable to the defendants for the reduced rate of freight only; and cannot hold them to a responsibility for injuries arising from overcrowding and suffocation, from which they had stipulated, in consideration of such reduction, to be exempted, and to which the negligence of the person sent by the plaintiffs themselves to attend the transportation contributed.

Exceptions overruled.

LIABILITY OF COMMON CARRIERS OF LIVE ANIMALS: *Smith v. New Haven etc. R. R. Co.*, 90 Am. Dec. 166; *Clarke v. Rochester etc. R. R. Co.*, 67 Id. 208, note.

POWER OF COMMON CARRIER TO RESTRICT HIS COMMON-LAW LIABILITY by special contract: *Baltimore etc. R. R. Co. v. Rathbone*, 88 Am. Dec. 664, and note 667; *Judson v. Western R. R. Corp.*, 83 Id. 646, and cases collected in note 651; such contract must be fairly made, be fully understood by the other party, and be clearly proved: *Adams Express Co. v. Nock*, 87 Id. 510; and a custom or usage limiting the liability of a common carrier cannot be shown: *Boon v. Steamboat Belfast*, 88 Id. 761; *Illinois Cent. R. R. Co. v. Smyser*, 87 Id. 301.

RESTRICTIONS UPON COMMON-LAW LIABILITY OF CARRIER ARE TO BE CONSTRUED MOST STRONGLY AGAINST CARRIER: *Hooper v. Wells etc. Co.*, 85 Am. Dec. 211.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in the following cases: *Pemberton Co. v. N. Y. Cent. R. R. Co.*, 104 Mass. 150; *School District v. Boston etc. R. R. Co.*, 102 Id. 556; *Pratt v. Ogdensburg etc. R. R. Co.*, 102 Id. 566; *Burroughs v. Norwich etc. R. R. Co.*, 100 Id. 30; *Grace v. Adams*, 100 Id. 507, 509; and is cited to the point that an authority to an agent to deliver goods to a common carrier for transportation can only be executed by obtaining the consent of the carrier to receive them, and the agent is therefore authorized to stipulate for the terms of transportation, in *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 508.

WALKER v. OSGOOD.

[98 MASSACHUSETTS, 343.]

REAL ESTATE BROKER BECOMES AGENT OF OWNER WHO EMPLOYS HIM TO SELL OR EXCHANGE LAND, and who agrees to compensate him for sending a customer with whom a sale or exchange may be effected; and the broker can recover nothing from the owner for his services, although an exchange is thus effected, if he exacted from the customer a conditional promise of compensation before sending him to the owner.

CUSTOM OR USAGE WILL NOT BE ALLOWED TO EXTEND RIGHT TO ACT FOR and receive compensation from both parties to matters in which the interests of the parties are or may be diverse.

ACTION of contract. The plaintiff, a real estate broker, sought to recover for services rendered under the following written promise: "If you send or cause to be sent to me by advertisement, or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate above described, I will pay you the sum of two hundred dollars." The writing was signed by the defendant, and appended to a description of certain real estate belonging to him. It appeared on the trial that the defendant went to the plaintiff's office and employed him to sell or exchange the real estate in question, and that the plaintiff advertised it accordingly. The plaintiff testified that he afterwards sent a customer named Gates to the defendant, and that the defendant and Gates made a bargain for the exchange of lands. He also testified that Gates agreed to pay him one hundred dollars in case a trade was effected. It was agreed that the defendant conveyed the land in question to Gates, and that Gates at the same time conveyed a portion of his farm to the defendant; and that the defendant refused payment of the plaintiff's bill for the two hundred dollars. But the defendant offered evidence tending to show the employment of other brokers before he saw Gates, by one of whom Gates was introduced to him. The ruling of the court, so far as material, appears in the opinion. Verdict for the plaintiff, and the defendant alleged exceptions.

S. E. D. Currier, for the defendant.

E. L. Hill, for the plaintiff.

By Court, **WELLS, J.** This case seems to us to stand upon the same principle as the decision in *Farnsworth v. Hemmer*, 1 Allen, 494 [79 Am. Dec. 756]. According to the statement in the bill of exceptions, the plaintiff is a real estate broker,

and was employed by the defendant "to sell or exchange" certain real estate for him. An exchange having been effected, the defendant resists the demand for the stipulated commission, on the ground that without his knowledge or consent, and in violation of good faith, the plaintiff was employed for a compensation by the other party in the same transaction. The court below ruled that this would not of itself defeat the claim; obviously assuming that the stipulation signed by the defendant expressed the whole obligation of the plaintiff, so that he had merely to show a literal compliance with that, as with a condition, to entitle himself to the sum named.

But the plaintiff's employment as a broker involved something more than this. Even if he had no authority to bind his principal, and was intrusted with no discretion in fixing the terms of the exchange, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him. Such employment is not like the offer of a reward for the performance of some act which another may undertake or forego, as he shall please. Employment implies acceptance of the service. A broker thus employed does not act in good faith if he turn aside all proposals that are not accompanied with an additional retainer or commission. Yet such is the temptation upon him, if he may levy a fee from both parties. When he has secured the retainer of the other party, he is interested, in order to win his double commission, to bring together these two to the exclusion of all others. The interests of his principal are in danger of prejudice from this counter-interest in the agent. And besides, the broker is ordinarily and almost inevitably intrusted, to a greater or less extent, with the confidence of his principal, and a knowledge of his views and purposes. This is incompatible with like relations to the other party. From the very nature and necessities of the case, such twofold interests and relations of the broker are inconsistent with the interests of the principal, and should not be maintained without his knowledge and consent.

To a certain extent, and for certain purposes, by the understanding and usages of business, and the nature of his employment, a broker is authorized to act for both parties. But what he does in that relation he does as an indifferent person, and not in the interest of either party. Every one who employs him is presumed to know and consent that to that extent, and for such purposes, he may so act. But beyond that, he has

no right to engage in the interests of the other party without the actual knowledge and consent of his principal. Even custom or usage will not be allowed to extend the right to act for and receive compensation from both parties to matters in which the interests of the parties are or may be diverse: *Farnsworth v. Hemmer*, 1 Allen, 494 [79 Am. Dec. 756].

The same general principle is asserted in *Rupp v. Sampson*, 16 Gray, 398 [77 Am. Dec. 416]. The verdict for the plaintiff was sustained in that case; but it was upon the distinct ground that under the instructions given to the jury they must be held to have found that the defendants' promise to pay was given, not for services in their employ as a broker, but for the performance of a certain specific act, namely, the introduction of Clew (the other party) to them. The court considered that, so far as the mere performance of such an act was concerned, it could make no difference to the defendants whether the plaintiff was in the employ and pay of the other party or not; and it was not such a fraud upon the other party, though concealed from him, as to render his contract with the defendants void for illegality. How far the plaintiff's dealings with the defendants were inconsistent (short of such illegality) with his obligations to Clew was not for determination in that suit.

The present case differs from *Rupp v. Sampson*, *supra*, in that the court assumes that the plaintiff was not employed by the defendant except "merely to send, or cause to be sent, to the defendant a party," etc., — a conclusion which, to say the least, is not necessarily to be drawn as an inference of fact, nor as a matter of legal construction, from the written paper received from the defendant, and which overlooks what is stated to have appeared in the case, namely, that the defendant "came to the plaintiff's office, and employed him to sell or exchange the real estate in question." From this statement, we think it is fairly to be understood that although the defendant did not empower the plaintiff to make an actual sale, or to bind him absolutely by his negotiations, yet he did employ him in the ordinary way to act for his interests in offering his property for sale, finding a purchaser or a favorable exchange, and generally in promoting the object for which the defendant sought his aid. For such a service the interests of the opposite parties are adverse; and the agent of one cannot, without his knowledge and consent, engage to promote the interests of the other by acting for him in the

same transaction. Although the plaintiff may have literally complied with the conditions of the defendant's written promise, yet the defendant may properly object that it was done, not for him, but for the other party, by whom he was employed, and to be paid for doing it.

Exceptions sustained.

RIGHT OF BROKER TO COMMISSIONS: *Tinges v. Moale*, 90 Am. Dec. 73, and note 76; *Rupp v. Sampson*, 77 Id. 416.

RELATION OF PRINCIPAL AND BROKER, what transaction creates: *Wykoff v. Irvine*, 80 Am. Dec. 461.

EFFECT OF BROKER BEING PREVENTED BY HIS EMPLOYER FROM COMPLETING SERVICES: *Gottschalk v. Jennings*, 45 Am. Dec. 70.

STOCK-BROKERS, DUTIES AND LIABILITIES OF: *Horton v. Morgan*, 75 Am. Dec. 311, and extended note 313; *Maryland Fire Ins. Co. v. Dalrymple*, 89 Id. 779, and note 791.

WHEN REAL ESTATE BROKER IS OR IS NOT ENTITLED TO COMPENSATION FROM BOTH PARTIES: *Farnsworth v. Hemmer*, 79 Am. Dec. 756, and note 758.

WHETHER PARTY DEALING WITH BROKER IS PRESUMED TO KNOW THAT LATTER ACTS AS AGENT: *Thompson v. McCullough*, 77 Am. Dec. 644; *Baxter v. Duren*, 50 Id. 602.

EVIDENCE OF USAGE OR CUSTOM, when admissible: *Cox v. Peterson*, 68 Am. Dec. 145; *Barlow v. Lambert*, 65 Id. 374, and prior cases collected in note 379; *Farnsworth v. Hemmer*, 79 Id. 756; *Reese v. Medlock*, 84 Id. 611.

BROKER HAS NO IMPLIED AUTHORITY, FROM USAGE OF TRADE, to warrant goods sold by him to be of merchantable quality: *Dodd v. Farlow*, 87 Am. Dec. 726; and see *Dickinson v. Gay*, 83 Id. 656.

INSURANCE BROKERS HAVE LIEN UPON POLICIES OF INSURANCE in their hands procured for their principals: *McKenzie v. Nevius*, 38 Am. Dec. 291.

DUTIES, LIABILITIES, AND RIGHTS OF BROKERS OTHER THAN STOCK-BROKERS. — *Definitions of.* — Briefly defined, a broker is one who makes a bargain for another, and for so doing receives a commission, commonly called brokerage: *Pott v. Turner*, 6 Bing. 702; *Jannen v. Green*, 4 Burr. 2103; *Saladin v. Mitchell*, 45 Ill. 79; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 381. An agent employed to sell goods on commission is a mere broker: *Dunn v. Wright*, 51 Barb. 244; but it is held that a salaried agent who does not act for a fee or rate per cent is not a broker: *Portland v. O'Neill*, 1 Or. 218. Strictly speaking, a broker is a mere "negotiator," "middle-man," or "go-between," never acting in his own name, but in the names of those who employ him: *Henderson v. State*, 50 Ind. 234; *Touro v. Cassin*, 1 Nott & McC. 173; *Fowler v. Hollins*, L. R. 7 Q. B. 616; S. C., 3 Eng. R. 232. He does not have the possession of the property which he is employed to buy or sell: *Baring v. Corrie*, 2 Barn. & Ald. 137; and hence has been defined as one who is engaged for others in negotiating contracts relative to property with the custody of which he has no concern: *Braun v. City of Chicago*, 110 Ill. 186. The early definitions of the term "broker" confined the employment of brokers to dealings between merchant and merchant: See 5 Com. Dig. 78; Livermore on Agency, 73. And in a comparatively recent English case, it was held that the brokerage must relate to goods or money, and that an agent who merely negotiates

a personal contract for work and labor is not a broker: *Milford v. Hughes*, 16 Mees. & W. 174. But the early definitions of the term have generally been regarded as too limited to include the various classes of brokers recognized at the present day, and extending to almost every branch of business. And the term is now indifferently applied to those who buy and sell real estate for others, and those middle-men who negotiate and make contracts between merchants in the interest of commerce, trade, and navigation: See *Glentworth v. Luther*, 21 Barb. 145; *Doty v. Miller*, 43 Id. 529; *Pierce v. Thomas*, 4 E. D. Smith, 354; *McGavock v. Woodlief*, 20 How. 221; *Doonan v. Ives*, 73 Ga. 295; *Little Rock v. Barton*, 33 Ark. 436; *Johnson v. Hulings*, 103 Pa. St. 498. And the several classes of brokers are distinguished by the articles in which they deal. Thus one who negotiates sales of grain or produce of others, without having its possession, is a produce or grain broker; and one who negotiates for the sale or exchange of lands of others is a real estate broker: *Braun v. City of Chicago*, 110 Ill. 186. So there are bill and note brokers, exchange-brokers, insurance-brokers, ship-brokers, and stock-brokers: See *Little Rock v. Barton*, 33 Ark. 436, 446. But pawnbrokers, who lend money in small sums on the security of personal property, are not strictly brokers at all, but carry on a distinct business on their own account: Id. 446, 450. As to stock-brokers, see *Horton v. Morgan*, 19 N. Y. 170; S. C., 75 Am. Dec. 311, and extended note 313.

Appointment of and Termination of Employment. — The broker's authority to act is conferred by appointment from his principal, as in the case of any other agent, and he may be appointed verbally or in writing. Proof of the consent of the principal is all that is necessary in ordinary cases: See *Goodspeed v. Robinson*, 1 Hilt. 423; *Fiero v. Fiero*, 52 Barb. 288; *Pierce v. Thomas*, 4 E. D. Smith, 354; *Brown v. Eaton*, 21 Minn. 409; *Dickerman v. Ashton*, 21 Id. 538; *Howe Machine Co. v. Clark*, 15 Kan. 492; *Fischer v. Bell*, 91 Ind. 243. But services rendered in negotiating a sale as a mere volunteer, without any employment, express or implied, will give no right to commissions: *Hinds v. Henry*, 36 N. J. L. 328; *Twelfth Street Market Co. v. Jackson*, 102 Pa. St. 269. And in California, a broker employed to buy, sell, or exchange real estate can recover no commissions or compensation for his services in that behalf, unless they were performed under a contract in writing subscribed by the principal: *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhue*, 67 Id. 657; Cal. Civ. Code, sec. 1624; *Schuller v. Farquarson*, 5 West Coast Rep. 583. A general authority to a broker to sell real estate is simply an authority to find a purchaser, and not to conclude and execute a contract binding upon his principal: *Duffy v. Hobson*, 40 Cal. 240; *Ryon v. McGee*, 2 Mackey, 17; and see *Vanhorne v. Frick*, 6 Serg. & R. 90. A broker's authority to act is personal, and cannot ordinarily be delegated by him to another, without the assent, express or implied, of his principal: *Cochran v. Irlam*, 2 Man. & S. 301; *Bocock v. Pavey*, 8 Ohio St. 270; *Smith v. Sublett*, 28 Tex. 163; *Elwell v. Chamberlain*, 2 Bosw. 230. And if no time for the continuance of a contract with a broker is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith: *Satterthwaite v. Freeland*, 3 Hun, 152; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 381; *Doonan v. Ives*, 73 Ga. 295. The agency of a real estate broker is said to cease upon the delivery of the title papers and payment for the property: *Walker v. Derby*, 5 Biss. 134.

Nature of Employment and Duties. — A broker is a mere negotiator between other parties: *Keys v. Johnson*, 68 Pa. St. 42; and his duty consists in bringing the minds of the vendor and vendee to an agreement: Id.; *Higgins v.*

Moore, 34 N. Y. 417; *Barnard v. Mounot*, 40 Id. 203; *Stewart v. Mather*, 32 Wis. 344; *Mullen v. Kertzele*, 7 Bush, 253. If a sale is effected through his agency as its procuring cause, his duty is performed: *Lloyd v. Matthews*, 51 N. Y. 124. It is no part of his duty to direct or advise as to the terms of the contract between the parties, or explain the meaning of the words used by them: *Feezie v. Parker*, 72 Me. 443; *Fox v. Rouse*, 47 Mich. 558. He may just as effectually produce and create the agreement between the parties, though absent when it is completed, and taking no part in the arrangement of its final details: *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 381; *McGavock v. Woodlief*, 20 How. 221. Nor does he ordinarily act in his own name, but in that of his employer: *Henderson v. State*, 50 Ind. 234; *Dunn v. Wright*, 51 Barb. 244; and he has ordinarily no authority *virtute officii* to receive payment for property sold by him: Id.; *Graham v. Duckwall*, 8 Bush, 12. Nor is he intrusted with the custody or possession of the property which he may be employed to buy or sell: *Baring v. Corrie*, 2 Barn. & Ald. 137; *Braun v. City of Chicago*, 110 Ill. 186; and is thus distinguished from a factor, who is intrusted with the possession of the property, and may buy and sell in his own name: *Perkins v. State*, 50 Ala. 154; *Slack v. Tucker*, 23 Wall. 321, 330; and see *Bryce v. Brooks*, 26 Wend. 367; *Marfield v. Douglass*, 1 Sand. 360. For the mere purpose of signing the memoranda of the sale, a broker is treated as the agent of both parties to the contract he was instrumental in effecting: *Barry v. Schmidt*, 57 Wis. 172; *Hinckley v. Arey*, 27 Me. 362; *Schlesinger v. Texas etc. R'y Co.*, 87 Mo. 146; but in other respects he is only the agent of the party originally employing him: Id. The general rule is, that a party cannot act as agent or broker for both parties in respect to the same transaction, because in such case there is a necessary conflict between his interest and his duty: *Raisin v. Clark*, 41 Md. 158; *Barry v. Schmidt*, 57 Wis. 172; *Everhart v. Searle*, 71 Pa. St. 256; *Murray v. Beard*, 102 N. Y. 505. A broker acting at once for both vendor and vendee assumes a double agency disapproved of by law, and which, if exercised without the full knowledge and free consent of both parties, is not to be tolerated: *Lynch v. Fallon*, 11 R. I. 311, citing the principal case; and see *Meyer v. Hanchett*, 43 Wis. 246. But the rule condemning double agency is held to be inapplicable where the broker is employed as a middle-man only, to bring the parties together to make their own contract, and so acting with the knowledge of both parties. In such a case he is not an agent for either party to buy or sell, but stands indifferent between them, and there is no conflict of duty: *Siegel v. Gould*, 7 Lana. 177; *Mullen v. Keetzele*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398; *Green v. Robertson*, 64 Cal. 75; *Herman v. Martineau*, 1 Wis. 151; *Stewart v. Mather*, 32 Id. 344; *Orton v. Scofield*, 61 Id. 382; *Redfield v. Tegg*, 38 N. Y. 212. And the current of authority is decidedly in favor of the validity of contracts of double agency, where it is clearly shown that each principal had full knowledge of all the circumstances connected with the broker's employment by the other, and had assented to the double employment: *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rowe v. Stevens*, 53 N. Y. 621; *Joslin v. Cowee*, 56 Id. 626; *Rolling Stock Co. v. Railroad*, 34 Ohio St. 450; *Leekins v. Nordlyke*, 66 Iowa, 471; *Bell v. McConnell*, 37 Id. 396; *Alexander v. N. W. Christian University*, 57 Ind. 466; *De Steiger v. Hollington*, 17 Mo. App. 382; and see *Rice v. Wood*, 113 Mass. 133; S. C., 18 Am. Rep. 459; *Scribner v. Collar*, 40 Mich. 375. But compare *Raisin v. Clark*, 41 Md. 158; S. C., 20 Am. Rep. 66; *Everhart v. Searle*, 71 Pa. St. 256; *Lynch v. Fallon*, 11 R. I. 311; and the cases are uniform in holding, that if a double employment exists and is not known to both principals, the party kept in ignorance is not bound: *Scribner*

v. *Collar*, 40 Mich. 375, and other cases above cited; *Farnsworth v. Hemmer*, 1 Allen, 494; S. C., 79 Am. Dec. 756, and note 758; *Bates v. Copeland*, 4 McAr. 50.

Broker's Duties towards Employer. — The degree of diligence and skill required of a broker is that which good business men of the same grade and locality are accustomed to apply under similar circumstances: See *Myles v. Myles*, 6 Bush, 237; *Kempker v. Roblyer*, 29 Iowa, 274; *Stevens v. Walker*, 55 Ill. 151; *Chandler v. Hoyle*, 58 Id. 46; or that which a prudent man would exercise in regard to his own affairs: *Todd v. Bourke*, 27 La. Ann. 385. The broker acts in a representative capacity, and cannot take upon himself incompatible duties and characters, or act in a transaction where he has an interest adverse to that of his principal: *Greenwood v. Spring*, 54 Barb. 375; *Taussig v. Hart*, 58 N. Y. 425; *Neuendorff v. World Mut. L. Ins. Co.*, 69 Id. 389; *Martin v. Moulton*, 8 N. H. 504; *Everhart v. Searle*, 71 Pa. St. 256. And if he acts adversely to his principal in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services: *Carman v. Beach*, 63 N. Y. 97; *Murray v. Beard*, 102 Id. 505; *Lynch v. Fallon*, 11 R. L. 311, 312, citing the principal case; *Tower v. O'Neil*, 66 Pa. St. 332; *Morrison v. Thompson*, L. R. 9 Q. B. 480.

Liabilities of Broker. — A broker is bound to keep accurate records of his proceedings, and to account in good faith for all profits made from contracts entered into on behalf of his principal: *Payne v. Waterston*, 16 La. Ann. 239; and see *Cooley v. Betts*, 24 Wend. 203; *Haas v. Damon*, 9 Iowa, 589; *Bate v. McDowell*, 17 Jones & S. 106. If he transfers or parts with the property in a way or for a purpose not authorized, he is liable as for a conversion: *Scott v. Rogers*, 31 N. Y. 676; *Baker v. Drake*, 53 Id. 211; S. C., 13 Am. Rep. 507; S. C., 66 N. Y. 518; and see *Second Ave. R. R. Co. v. Mehrbach*, 18 Jones & S. 1; but if authorized to sell at a given price, and he sells at a lower price, or if he misapplies the avails, or takes inadequate security, he is liable for misconduct, but not for a conversion: *Laverty v. Snetlian*, 53 How. Pr. 152; S. C., 68 N. Y. 522. If he makes a purchase without authority, the principal may repudiate the contract, and bring suit for the recovery of the money advanced to make the purchase: *Voris v. McCredy*, 16 How. Pr. 87.

It is well settled that a broker cannot be held personally liable upon a contract made by him on behalf of a disclosed principal: *Ferris v. Kilmer*, 48 N. Y. 300; *Tiller v. Spradley*, 39 Ga. 35. But if he contracts in his own name, without disclosing his principal, he thereby renders himself personally liable, and both he and the principal may be sued at the election of the other contracting party: *Youghiogheny Iron etc. Co. v. Smith*, 66 Pa. St. 340; *Cobb v. Knapp*, 71 N. Y. 348; *Jessup v. Steurer*, 75 Id. 613; *Button v. Winslow*, 53 Vt. 430; *Calder v. Dobell*, L. R. 6 C. P. 486; *Beebe v. Robert*, 12 Wend. 413; S. C., 27 Am. Dec. 132. The broker will be personally liable in such case, although it was supposed by the third party that he acted only as agent: *Cobb v. Knapp*, 71 N. Y. 348; and see *Falkenburg v. Clark*, 11 R. L. 278; *Royce v. Allen*, 28 Vt. 234; *Baldwin v. Leonard*, 39 Id. 260; *Wilder v. Cowles*, 100 Mass. 487; *Nixon v. Downey*, 49 Iowa, 166; but it is held to be otherwise if the third party actually knew, or even had sufficient information to fairly create an inference, of the existence of the agency, in *Wright v. Cabot*, 89 N. Y. 570; and see *Baring v. Corrie*, 2 Barn. & Ald. 137; *Baxter v. Duren*, 29 Me. 434; *Bliss v. Bliss*, 7 Bosw. 345; *Lyon v. Williams*, 5 Gray, 557. If a

broker buys property without disclosing his principal, he becomes personally liable for the purchase price, but is entitled to collect such price from the principal; and the principal can relieve himself from such liability only by showing payment to the vendor, or a release for a good and valuable consideration from the broker: *Knapp v. Simon*, 96 N. Y. 284. And a third party, electing to sue an undisclosed principal, must take the account between the principal and the agent as he finds it when he first discovers the principal; and if the agent has then been paid in full, the creditor can have no claim on the principal: *Paine v. Tillinghast*, 52 Conn. 532, 538; *McCullough v. Thompson*, 13 Jones & S. 449; and see *Armstrong v. Stokes*, L. R. 7 Q. B. 598. Where a broker sells a note for cash without disclosing the name of his principal, he is liable to the purchaser for the amount, if the signatures turn out to be forged: *Aldrick v. Jackson*, 5 R. I. 218; *Thompson v. McCullough*, 31 Mo. 224; *Merriam v. Wolcott*, 3 Allen, 258; *Sire v. Faures*, 15 La. Ann. 189; *Dumont v. Williamson*, 18 Ohio St. 515; but if he disclosed the name of his principal, and has paid the money over to him, he cannot be held liable: *Morrison v. Currie*, 4 Duer, 79. Compare *Thomson v. Davenport*, 9 Barn. & C. 78; *Baxter v. Duren*, 29 Me. 434; *Merriam v. Wolcott*, 3 Allen, 258; *Fisher v. Rieman*, 12 Md. 497.

One who deals with a person whom he knows to be a broker, although the name of the principal is not disclosed, cannot set off a claim due from the broker to him in an action brought by the principal for the purchase price: *Bliss v. Bliss*, 7 Bosw. 339; *Evans v. Wain*, 71 Pa. St. 69; *Knapp v. Simon*, 96 N. Y. 284.

That a broker who makes a sale of goods fraudulently obtained by his principal may be held liable in an action of trover by the true owner was held by a divided court, in *Fowler v. Hollins*, L. R. 7 Q. B. 616; S. C., 3 Eng. 232.

Rights of Brokers, Compensation, Lien, etc. — A broker's compensation is ordinarily a commission on the price or value of the thing sold or exchanged, his right to which will depend upon the terms of his employment and the performance of the service: *Portland v. O'Neill*, 1 Or. 218; *Goodspeed v. Robinson*, 1 Hilt. 423; *Jacobs v. Kolff*, 2 Id. 133; *Broad v. Thomas*, 7 Bing. 99; *Read v. Rann*, 10 Barn. & C. 438. He must establish his employment as broker, either by previous authority or by the acceptance of the agency and the adoption of his acts: *Keys v. Johnson*, 68 Pa. St. 42; *Twelfth St. Market Co. v. Jackson*, 102 Id. 269; *Hinds v. Henry*, 36 N. J. L. 328; and it must also appear that he accomplished what he undertook to perform, otherwise he is not entitled to the agreed commissions: *Jacobs v. Kolff*, 2 Hilt. 133; *McGarock v. Woodlief*, 20 How. 221. His right to compensation attaches on completion of the service, and not before: *Veazie v. Parker*, 72 Me. 443; and see *Thomas v. Lincoln*, 71 Ind. 41. Nor can he demand his commission for services not accomplished by him within the time limited by his contract: *Beauchamp v. Higgins*, 20 Mo. App. 514; *Fultz v. Wimer*, 34 Kan. 576. But under a contract to pay a broker compensation for a sale "effected in any wise through his influence or instrumentality" within a fixed period, if the broker before the expiration of the period named induces a purchaser to begin negotiations with the owner, he is entitled to his commissions, although the sale is not consummated until after such period has elapsed: *Goffe v. Gibson*, 18 Id. 1.

Where a broker is employed to effect a sale of property, or to find a customer, and through his efforts a customer is found, or the seller and buyer brought together, he has performed his contract, and is entitled to his com-

missions: *Higgins v. Moore*, 34 N. Y. 417; *Barnard v. Monnot*, 40 Id. 203; *Duclos v. Cunningham*, 102 Id. 678; *Desmond v. Stebbins*, 140 Mass. 339; *Veazie v. Parker*, 72 Me. 443. If the broker finds a purchaser able and willing to take upon the terms named, he is entitled to his commission, although the principal concludes the sale himself: *McClave v. Paine*, 49 N. Y. 561; *Jones v. Adler*, 34 Md. 440; *Hinds v. Henry*, 36 N. J. L. 328; *Dolan v. Scanlan*, 57 Cal. 261; *Timberman v. Craddock*, 70 Mo. 638; *Fox v. Rouse*, 47 Mich. 558; *Watson v. Brooks*, 8 Saw. 316; *Stillman v. Mitchell*, 2 Rob. (N. Y.) 523; compare *Wyckoff v. Taylor*, 13 Daly, 564; or refuses to deliver the property: *Kelly v. Phelps*, 57 Wis. 425; or refuses performance in some other way: *Love v. Miller*, 53 Ind. 294; *Bailey v. Chapman*, 41 Mo. 536; *Cooke v. Fiske*, 12 Gray, 491; or although the sale is never completed, if the failure to complete it is in consequence of a defect of title, and without any fault on the part of the broker: *Goodridge v. Holladay*, 18 Ill. App. 363; *Knapp v. Wallace*, 41 N. Y. 477; *Gonzales v. Broad*, 57 Cal. 224; *Doty v. Miller*, 43 Barb. 529; *Glentworth v. Luther*, 21 Id. 145. *Contra: Rockwell v. Newton*, 44 Conn. 333. It is not necessary that the negotiations for sale or exchange should be conducted by the broker to entitle him to his commissions, if it be shown that he introduced the parties, and his introduction led to the contract, so that he was the procuring cause of the sale: *Sussdorff v. Schmidt*, 55 N. Y. 319; *Veazie v. Parker*, 72 Me. 443; *Wyckoff v. Bliss*, 12 Daly, 324; *Attrill v. Patterson*, 58 Md. 226. But the broker is bound to act in good faith in furnishing a customer, and when one is presented, the principal is not bound to accept him or to pay the commissions unless he is ready and able to perform the contract on his part according to the terms proposed: *Fraser v. Wyckoff*, 63 N. Y. 445; *Wylie v. Marine Nat. Bank*, 61 Id. 415; *Tombs v. Alexander*, 101 Mass. 255; S. C., 3 Am. Rep. 349; *Sibbald v. Bethlehem Iron Co.*, 83 Id. 378; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Hamlin v. Schulte*, 31 Minn. 486; but if the principal accepts him, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned: *Coleman v. Meade*, 13 Bush, 358; *Ratts v. Shepherd*, 14 Pac. Rep. 496 (Kan.). The principal cannot prevent the recovery of commissions by changing the terms proposed to the broker: *Stewart v. Mather*, 32 Wis. 344; *Gorman v. Scholle*, 13 Daly, 516; *Bash v. Hill*, 62 Ill. 216. But it is held that a sufficient purchaser is not offered by a real estate broker unless he is of sufficient pecuniary responsibility: *Iselin v. Griffith*, 62 Iowa, 668. So if the negotiations set on foot by a broker are completely broken off by disagreement as to the price, and the property is afterwards sold to the same party by another broker, the first broker is not entitled to commissions: *Livezy v. Miller*, 61 Md. 326. But where a contract is made to pay a broker commissions on the sale or exchange of real estate, a change of ownership in the property described in the contract during the negotiations does not necessarily release the principal from payment of the commissions; nor is he released by the fact that the negotiations were not at first successful, and were declared by him to be terminated, provided they are continued by him and are successful: *Fox v. Byrnes*, 20 Jones & S. 150.

If a broker is employed under a special contract to negotiate for his principal the purchase of real property at a fixed sum as his compensation for his services in connection with such purchase, it is held that his services will not end, nor his contract be completed, until all necessary arrangements are made whereby the principal may acquire the title to the property. It is not enough merely to procure a contract for a sale from parties who are unable to

make a valid conveyance: *Kerfoot v. Steele*, 113 Ill. 610; and see *Walker v. Derby*, 5 Biss. 134. But as a general rule, a broker is entitled to compensation when he has found for his employer one who makes a binding contract in writing for the purchase or sale of the property to be bought or sold: *Veasey v. Parker*, 72 Me. 444; *Rice v. Mayo*, 107 Mass. 550. And if a broker effects a sale of goods "to arrive," he is entitled to his commissions although the goods do not arrive, and the sale is never consummated: *Paulsen v. Dallett*, 2 Daly, 40. So a broker employed to obtain a loan is not bound to procure a binding contract to make the loan from a party willing to do so to entitle him to commissions. It is enough to procure such a party, and the eventual right to commissions then depends upon the subsequent negotiations between the principals: *Burling v. Gunther*, 12 Daly, 6.

In the absence of a special agreement as to the amount of the broker's commissions, custom at the time and place of employment may be shown: *Morgan v. Mason*, 4 E. D. Smith, 636; but evidence of custom is inadmissible when the parties have covered the points by an express agreement: *Ware v. Hayward Rubber Co.*, 3 Allen, 84; *Illingsworth v. Slosson*, 19 Ill. App. 612; *Bower v. Jones*, 8 Bing. 65. If no agreement fixing commissions exists, and no usage can be shown, the broker is entitled to reasonable compensation: *Potts v. Acchternacht*, 93 Pa. St. 138. And if the testimony tends to show that the broker rendered some service, but did not effect a sale, an instruction that if the jury believe that he rendered some service he is entitled to recover on a *quantum meruit*, is not improper: *McMurtry v. Madison*, 18 Neb. 291. But if the duties of a broker are executed in such a manner that no benefit results from them, he is not entitled to recover commissions, or even a compensation for his trouble: *Hammond v. Holladay*, 1 Car. & P. 384; *Dodge v. Tileston*, 12 Pick. 328; *Hoffman v. Livingston*, 14 Jones & S. 552. So a broker is required to act with the utmost good faith towards his principal, and if he does not so act, he is entitled to nothing: *Pratt v. Patterson*, 112 Pa. St. 475; *Murray v. Beard*, 102 N. Y. 505; and see *Segar v. Parrish*, 20 Gratt. 672. Nor is a broker entitled to commissions for services rendered in connection with a transaction which is in itself illegal or immoral or against public policy: *Ferreira v. Gabell*, 89 Pa. St. 89; *Bank v. Cunningham*, 25 Am. Law Reg., N. S., 138 (Ga.); and see *Smith v. Bouvier*, 70 Pa. St. 325. Nor can he recover for services rendered in violation of a statute requiring a broker to take out a license, and declaring it an offense to engage in such business without a license: *Costello v. Goldbeck*, 9 Phila. 159; *Holt v. Green*, 73 Pa. St. 198; *Johnson v. Hulings*, 103 Id. 498.

As a general rule, a broker cannot act for and receive commissions from both parties, unless they are both fully informed that he is acting in a double capacity. It is held to be contrary to public policy to allow the broker a right of action against both to recover his commissions, even though he had acted in good faith: *Bell v. McConnell*, 37 Ohio St. 396; *Rice v. Wood*, 113 Mass. 133; S. C., 18 Am. Rep. 459; *Scribner v. Collar*, 40 Mich. 375; *Lynch v. Fallon*, 11 R. I. 311; *Meyer v. Hanchett*, 39 Wis. 419; S. C., 43 Id. 246, all of which cite the principal case; *Raisin v. Clark*, 41 Md. 158; S. C., 20 Am. Rep. 66; *De Steiger v. Hollington*, 17 Mo. App. 382; *Spyer v. Fisher*, 5 Jones & S. 93; *Webb v. Paxton*, 32 N. W. Rep. 749 (Minn.); *Morison v. Thompson*, L. R. 9 Q. B. 480; S. C., 10 Eng. R. 129; *Harrington v. Victoria Dock Co.*, L. R. 3 Q. B. D. 549; and evidence is not admissible to show a custom among brokers to charge a commission to both parties in such cases: *Rice v. Wood*, 113 Mass. 133; S. C., 18 Am. Rep. 459, citing the principal case; *Raisin v. Clark*, 41 Md. 158; S. C., 20 Am. Rep. 66. But an exception to

the general rule is recognized where the broker has no duty to perform except to bring the parties together, leaving them to negotiate and come to an agreement between themselves; and where this constitutes the broker's whole duty, he may take a commission from both sides: *Orton v. Scofield*, 61 Wis. 382; *Shepherd v. Hedden*, 29 N. J. L. 334; *Mullen v. Keetleb*, 7 Bush, 253; *Wyckoff v. Bliss*, 12 Daly, 324; *Green v. Robertson*, 64 Cal. 75; *Siegel v. Gould*, 7 Lana. 177. But the exceptional character of the case must clearly appear to entitle it to exemption from the general principle: *Scribner v. Collar*, 40 Mich. 375.

Strictly Speaking, Broker can have No Lien, since he has not under ordinary circumstances any property of his principal in his possession on which the right of lien can attach. But although he does not usually possess the right of general lien, he may be in a situation to exercise the right of particular lien: *Barry v. Boninger*, 46 Md. 59; as, where he sells a cargo of merchandise, he may have a lien upon the proceeds in his hands for his commissions in effecting that particular sale, though not for his entire claim against the owners: *Id.* If securities are specifically pledged to a broker to secure the payment of a particular loan or debt, he has no lien thereon for a general balance, or for the payment of any other claim: *Wyckoff v. Anthony*, 9 Daly, 417; and see *Lane v. Bailey*, 47 Barb. 395. And if a broker holds certain chattels especially appropriated as security for a loan obtained by him from a third person for his principal, he cannot, in the absence of a special agreement, appropriate any part of the proceeds of such chattels to the payment of a debt due by the principal to him: *James's Appeal*, 89 Pa. St. 54. In accordance with a usage existing among insurance brokers, they have a lien upon all policies in their hands procured by them for their principals for the payment of the sums due to them for commissions, disbursements, advances, and services in and about the same, but not for the balance of a general account embracing items wholly disconnected with the business of the agency: *McKennis v. Nevius*, 22 Me. 138; S. O., 38 Am. Dec. 291.

THE PRINCIPAL CASE IS CITED to the point that where the same agent is retained by different persons on commission to negotiate sales or exchanges of their property, and he brings about an exchange between two of them, neither knowing that he was acting for the other, he has not a right of action against both to recover his commissions, even though he acted in good faith, in *Scribner v. Collar*, 40 Mich. 378; *Lynch v. Fallon*, 11 R. I. 312; *Meyer v. Hanchett*, 39 Wis. 424; *Bell v. McConnell*, 37 Ohio St. 400; *Rice v. Wood*, 113 Mass. 135; and is cited to the point that an agent cannot, without the consent of his principal, become the purchaser for his own use and benefit of property which is intrusted to him to sell, in *Smith v. Townsend*, 109 Mass. 502.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PEOPLE v. DE MILL.

[15 MICHIGAN, 164.]

INFORMATION IS FATALLY DEFECTIVE which charges certain parties with intrusion into the offices of wardens and vestrymen of St. Paul's Church, "a corporation created by the authority of this state," without showing in what manner the organization became a body corporate, not having been created by special charter.

IT IS SUFFICIENT TO AVER IN GENERAL TERMS EXISTENCE OF CORPORATION created by special charter. But where it is not so created, the facts showing its existence must be set forth.

EXISTENCE OF CORPORATION IS JURISDICTIONAL FACT WHICH MUST BE SET FORTH, unless judicially known, where an information is filed for usurpation of office.

NATURE AND DUTIES OF ALLEGED OFFICE IN CORPORATION, NOT JUDICIALLY KNOWN, MUST BE SO DESCRIBED, in an information filed for usurpation of the office, as to show whether it is an office within the meaning of the law relating to the usurpation of franchises.

IT IS MISJOINDER OF PARTIES, where persons claiming to be wardens and other persons claiming to be vestrymen of a church join as relators to test in one proceeding their rights to the offices respectively, against parties claiming adversely.

INFORMATION in the nature of a *quo warranto*, filed to determine the legality of the election of the wardens and vestrymen of St. Paul's Church in the city of Detroit, charging the defendants with intrusion into the offices of wardens and vestrymen of said church, "a corporation created by the authority of the said state," of Michigan. The parties claiming to be wardens and those claiming to be vestrymen joined as relators. The defendants demurred to the information, urging as special causes, that it was not averred with sufficient cer-

ainty and precision that said corporation had been created, and still existed, so as to bring the case within the purview of the statute relative to the usurpation of franchises; and that the information presented the alleged rights of several relators to several distinct and separate offices, of different classes, and with distinct duties attached. A general replication was filed to the demurrer.

A. D. Fraser and L. Bishop, for the defendants.

H. K. Clarke and C. I. Walker, for the relators.

By Court, COOLEY, J. It is commonly a source of regret when a court is compelled to dispose of the case before it without passing upon the main questions raised; but the nature of the record in the present case is such as to leave us no alternative. We are clearly of opinion that the information is fatally defective in two particulars.

It is defective, firstly, in not showing in what manner the organization in which the defendants are accused of having usurped office became a body corporate. When any person, or association of persons, is charged with usurping the franchise of a corporation, it is sufficient for the attorney-general to call upon them, in general terms, to show by what authority they claim the right to exercise such franchise; but when the very nature of the proceeding is such as to assume the actual existence of a corporation, and it is alleged that defendants usurp some authority therein, no ground whatever is shown for calling upon defendants to show their right until it is made to appear that a corporation exists. The claim to a corporate franchise, which does not exist in fact, may be a great public wrong, demanding immediate redress; but the claim to an office in a corporation which has no existence can hardly be a matter of public concern, unless accompanied with the attempt to exercise a corporate franchise; in which case the remedy would be an information, not for the unlawful intrusion into an office, but for the usurpation of the franchise. The information in a case like the present must, therefore, show that a corporation exists; for until that is shown, it is not made to appear that there is any office into which the defendants can intrude. The precedents in proceedings against public officers are not applicable in all particulars to the case before us; since those are cases where the courts must judicially take notice of the existence of the offices, and no allegations are necessary to show how they were created.

The statute under which this information is filed (Comp. Laws, sec. 5291) authorizes this proceeding in the case of usurpation of office "in any corporation created by the authority of this state." The information avers, in the words of the statute, that the corporation known as "the rector, wardens, and vestrymen of St. Paul's Church in the city of Detroit," of which the defendants claim to be wardens and vestrymen, is "a corporation created by the authority of this state"; and we might infer it to be the view of the pleader that the statute establishes a rule of pleading; whereas, in our opinion, it only points out the cases in which an information may be filed, leaving the mode of showing that the case is one within the statute, to be governed by the rules of pleading before in force.

Where a corporation has been created by special charter, we do not regard it necessary, though perhaps usual, to do more in the information than to aver its existence in general terms; since the court is bound to take judicial notice of the charter (Comp. Laws, sec. 2, cl. 18), and is thus informed of the actual corporate existence. But as the body in question has no such charter, and if it exists as a corporation at all, must have been constituted such under some general law of the territory or state, by acts *in pais*, it is obvious that there is nothing upon the face of this information by which the court can see that the allegation that the church is a corporation is true in fact. The bare averment that it is one is but a conclusion of law drawn by the pleader, but which the court ought to have the means of drawing for itself from the facts set forth.

We were referred upon the argument to several cases in which it has been held that when the state calls upon one to show cause why he claims to exercise a corporate franchise, or to possess a public office, the allegations of the attorney-general may be of the most general character, while the defendant is required to set forth specifically, and with particularity, the grounds of his claim, and the continued existence of his right: *People v. Mayworm*, 5 Mich. 148; *People v. River Raisin and Lake Erie R. R. Co.*, 12 Id. 398. We have no disposition to qualify these decisions in any way. The state has always a right to demand of any one assuming a public office or franchise to show his authority therefor; but the state has no concern with the unfounded claims which parties may make to an office not existing in fact. The ex-

istence of the corporation in the present case is a jurisdictional fact which must be set forth; while there is no corresponding jurisdictional fact to be alleged in the cases cited. The right to file information in those cases depended solely upon the discretion of the attorney-general; while in this case there must be corporate existence, or he is not authorized to call upon defendants to show ground for their claims. Jurisdiction appearing, the facts relating to the usurpation or intrusion may be alleged here, as they were in those cases, in very general terms; and similar allegations to those referred to in the cases cited have not been objected to in the present case.

There is also a broad distinction in respect to this particular point between the cases now before us and those cited by counsel from the federal decisions, where the question related to the averment of citizenship, where one of the parties was a corporation. That question affected either personal rights to sue or personal exemptions from being sued in the particular court; and the fact was one of which the court would take no notice in any stage of the case unless it was specially put in issue. But here the fact of corporate existence is not the basis of any authority at all in the court to act in respect to the subject of controversy, and it is not one in respect to which there can be a waiver by the parties. This proceeding by information is of a prerogative character, to enable the court to see that privileges or franchises granted by or pertaining to the sovereignty of the state are not usurped, intruded upon, or abused; and it pertains to the dignity of the court to see that parties do not use it, even by consent, for private purposes. If the general allegation employed in this case were sufficient, and the proof could be waived by the parties, it would be easy to impose upon the court the disputes as to offices in voluntary associations, in no way affecting prerogatives of sovereignty, and to which this proceeding has no application whatever.

But if this were not a jurisdictional defect, there would still be reasons why the mode in which the corporation became such should be pointed out. Although the statute says the information may be filed against "any person" usurping office in "any corporation" created by authority of this state, yet there must be very many cases in which the court would be at liberty to refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a district school

debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of offices for the purposes of their organization, it can scarcely be seriously urged that the supreme court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not rise to the dignity of being entitled to the notice of the attorney-general by information, if, in fact, there be not corporations which are not within the intention of the statute, — upon which we express no opinion. An information filed in a case not proper for the consideration of the court it should have the opportunity to dismiss in some preliminary stage of the case; and for that reason, if for no other, it ought to have the facts set forth which would direct it to the law authorizing the corporation, prescribing its functions, and indicating the powers and duties of its officers. We ought to be able to see whether the office is one provided for by the statute, or whether, instead, it is created by some derivative authority; so that we may draw the line of distinction between those which are “offices” within the meaning of the statute, and those which are rather the positions of agents or servants merely.

But the information is bad, secondly, because of misjoinder of parties and of causes of complaint. It may be proper that the two parties claiming to be wardens should unite in a proceeding to test the right of those in possession, and that the eight vestrymen should do the same. This might depend upon the mode of election. But no mode of election or appointment could authorize persons claiming different offices to unite their complaints, and seek to determine the title to both offices in one proceeding, without a statute specially permitting it. There is no such statute in this state; and the difficulties in the way of making it of service are so great that it could hardly be desirable that one should be passed. It is just as competent to test in one suit the right to the offices of sheriff and treasurer of a county as to those of wardens and vestrymen in a church. They may derive their title from the same election, and the questions in dispute may be the same; but this is no more than will often happen when several offices of the same municipality are in contest at the same time. The misjoinder is as fatal as it would be for two persons, having distinct and separate claims for trespasses committed by two others, to join in a suit to recover damages

therefor. The similarity of duties in the two offices, or the fact that the incumbents participate in the same duties, if such be the fact, cannot change this fundamental rule in pleading.

We are of opinion that the demurrer is well taken. As on the ground of the misjoinder, if for no other reason, an amendment could not be allowed, the judgment must be final.

CHRISTIANCY, J., and MARTIN, C. J., concurred.

CAMPBELL, J., being a party, did not sit in this case.

INFORMATION FOR MANDAMUS, nature and requisites: See *State v. Board of Equalisation*, 74 Am. Dec. 381; *Arberry v. Beavers*, 55 Id. 791.

QUO WARRANTO AGAINST CORPORATIONS: See *State v. Bailey*, 79 Am. Dec. 405, and prior cases collected in note 411.

IN INFORMATION IN NATURE OF QUO WARRANTO, FRANCHISES AND PRIVILEGES ALLEGED TO BE USURPED need only be set forth in general terms: *People v. River Raisin etc. R. R. Co.*, 86 Am. Dec. 64; see *People v. Hartwell*, 86 Id. 70.

ALLEGATION OF CORPORATE EXISTENCE IN PLEADING: See *Stein v. Indianapolis Build. etc. Assoc.*, 81 Am. Dec. 353; *Holloway v. Memphis etc. R. R. Co.*, 76 Id. 68, and cases collected in note 71.

THE PRINCIPAL CASE IS CITED to the point that if an association purporting to be a corporation is called upon to show by what authority it assumes to exercise the franchise, it must do so with distinctness and particularity, in *Palmiter v. Pere Marquette Lumber Co.*, 31 Mich. 184.

STRONG v. GRAND TRUNK RAILROAD COMPANY.

[15 MICHIGAN, 206.]

CARRIER MAY MAINTAIN ACTION AGAINST INTERMEDIATE CONSIGNEE TO RECOVER FOR DEDUCTION OF FREIGHT made by virtue of a mercantile custom, allowing a deduction for shortage not arising from the fault of the prior carrier, if the deduction was suffered under protest, and the consignee had not accounted with the owner of the cargo when action was commenced.

BILL OF LADING IS OPEN TO EXPLANATION like other receipts, and the carrier may show that the actual amount which came to his hands is different from that stated.

CUSTOM TO BE ADMITTED INTO LAW must appear to have been general and uniform, peaceably acquiesced in, and not subject to contention and dispute.

ALLEGED CUSTOM BY WHICH INTERMEDIATE CONSIGNEE IS AUTHORIZED TO DEDUCT from back freight earned any deficiency in the cargo, as shown by a comparison of the bill of lading with the measurement of the carrier receiving it, and that the prior carrier shall not be allowed to show that there was error in the bill of lading, is not a custom that the courts will recognize and enforce.

ASSUMPSIT to recover a balance of freight due upon a cargo carried in the plaintiff's vessel, and delivered to the defendant as intermediate consignee. The opinion states the facts. Trial without a jury, and judgment for the defendant.

H. B. Brown, for the plaintiff.

Maynard, Meddaugh, and Swift, for the defendant.

By Court, COOLEY, J. This case presents questions regarding the proof and validity of a mercantile custom, by which an intermediate consignee is authorized to deduct from the back freight earned any deficiency in the cargo, as shown by a comparison of the bill of lading with the measurement of the carrier receiving it.

It appears that the plaintiff's vessel, the schooner *Swallow*, took on board a quantity of corn at Chicago, consigned to the Bank of Montreal, Cobourg, and stated in the bill of lading to be 20,034 $\frac{3}{4}$ bushels. This was the measurement of the elevator at Chicago, and was supposed at the time to be correct. On the delivery of the cargo to the defendants as intermediate consignees at Sarnia, a deficiency of 205 $\frac{1}{2}$ bushels was discovered, and the defendants thereupon refused to pay the freight upon the amount actually delivered, except subject to a deduction of the value of this deficiency, justifying their refusal upon the custom mentioned. The evidence of the master of the vessel, if trustworthy, would show very clearly that the apparent deficiency was in consequence of erroneous measurement at Chicago; and as the supposed custom makes no exception of the case where the master is not in fault, we must consider its validity on the assumption that the facts are as claimed by the plaintiff.

It may be well to see at the outset what the rights of the parties would be in the absence of any such custom, and what the changes are which it proposes to make in the law.

There can be no doubt that although the bill of lading specifies the amount received, it is, notwithstanding, like other receipts, open to explanation, and the carrier is at liberty to show that the actual amount which came to his hands is different from that stated: *Wolfe v. Myers*, 3 Sand. 7; *Ward v. Whitney*, 3 Id. 399; *Dickerson v. Seelye*, 12 Barb. 99; *Backus v. Schooner Marengo*, 6 McLean, 487; *Blanchard v. Paige*, 8 Gray, 287. And see *Ellis v. Willard*, 9 N. Y. 529. The qualification of this rule is where third persons have acquired rights

by purchase or advance of money, based upon the statement contained in the bill of lading, and relying upon its accuracy; the extent of which qualification, and when, and against whom applicable, it does not become important to discuss here, inasmuch as it is not claimed that any such rights have intervened.

Although the consignee of property is authorized to recoup from the freight earned any losses properly chargeable to the carrier, it is well settled, and indeed follows logically from the rule before stated, that he is not entitled to deduct as deficiencies any difference between the amount delivered to him and that receipted by the bill of lading, where the carrier can show an error in the bill, and that he actually delivered all that he received: *Bissell v. Price*, 16 Ill. 408; *Ryder v. Hall*, 7 Allen, 456; *Meyer v. Peck*, 33 Barb. 532; S. C., 28 N. Y. 590; *Sears v. Wingate*, 3 Allen, 103. See, for the same principle, *Bowman v. Hilton*, 11 Ohio, 303; *Lee v. Salter*, Lalor, 163. That the carrier has a lien upon the cargo for the freight earned is not disputed: 3 Kent's Com. 214; Chitty on Carriers, 220; Parsons on Mercantile Law, 212; and an intermediate consignee by whom the property is received, subject to the charges, is liable to an action therefor in case of neglect or refusal to make payment: Abbott on Shipping, 421; *Canfield v. Northern R. R. Co.*, 18 Barb. 586.

The custom alleged, if valid, changes the settled law in several important particulars. 1. It precludes the carrier, as between himself and the intermediate consignee, from explaining the bill of lading and showing any error that may have occurred in stating the quantity; and this without regard to the question of intervening equities. 2. It gives to the intermediate consignee the right not only to deduct the deficiencies chargeable to the carrier, but also all such discrepancies between the bill of lading and the actual amount delivered by the latter, as have resulted from erroneous measure or count, and consequently are not deficiencies in any proper or legal sense, and could not, in a suit between the carrier and the ultimate consignee, be recouped at all. 3. As to any amount thus deducted and not properly chargeable to the carrier, he is deprived of his lien upon the cargo, and if he has any remedy for it, he is obliged to resort to the personal responsibility of the party liable to him in lieu of the security which he took into his own hands when the cargo was received. Meantime the value of the supposed deficiency is paid over to the ulti-

mate consignee, who has no claim to it whatever, if in fact he receives all that was consigned to him.

Before proceeding to discuss the custom upon principle, we shall examine the cases cited upon the argument, and which are supposed to have some bearing upon the question of its validity. There are several cases where it has been held to be the duty of an intermediate carrier to protect the interests of the consignee in the property carried, and where certain powers for the adjustment of damages actually sustained have been recognized as vested in him. In *Bissell v. Price*, 16 Ill. 414, it is said that "while the warehouseman or carrier is authorized to advance for and on account of the consignee previous charges upon the goods, he is bound to act in good faith towards, and to carefully watch the interests of, the owner, whoever he may be. He is bound to do this to the same extent that a prudent man would were he present and acting for himself. He must see that the goods are in apparent good order, as described in the previous bill of lading, or, if not, use reasonable exertions to ascertain how they became damaged, and the party liable therefor. So, also, to the same extent he must see that the previous charges are reasonable before he is authorized to pay them."

There is nothing in this indicating that an intermediate carrier is or may be vested with greater powers than those possessed by the owner himself; or that the prior carrier, in dealing with him, can be subjected to demands against which he would have a complete defense as between himself and the ultimate consignee. On the contrary, the court hold the intermediate carrier to be vested, as respects the property carried, only with certain powers of the owner, and bound on his behalf to exercise them with diligence and good faith.

The facts in *Fitchburg and Worcester R. R. Co. v. Hanna*, 6 Gray, 539 [66 Am. Dec. 427], were, that several carriers, whose operations constituted one continuous line of transportation from Fitchburg to New York, and who, by mutual agreement, divided between them, in certain specified proportions, the freight earned upon the whole route, had carried property for the defendant, and in a suit brought by one of them to recover the charges, the defendant sought to recoup damages to the property occurring somewhere on the route, but not shown to have occurred upon that portion over which the operations of the plaintiff extended. The court held the recoupment allowable, but at the same time said: "If this service had been per-

formed, and no special agreement had been made in relation to the terms upon which it should be done, each of the several parties who contributed towards it would have been entitled to a reasonable compensation, in proportion to the service which they respectively rendered, and would have been liable only for such failures and delinquencies as occurred on their own portions of the line." It is obvious that the facts as stated have no analogy to those now before us, while the general rule stated by the court, in the absence of any joint undertaking, is the one which the defendants in this case seek to avoid by proof of the custom.

The case of *Davis v. Pattison*, 24 N. Y. 317, which was supposed on the argument to be most directly in point, does not seem us on careful examination to be even analogous. It appears that one Davis received at Oswego three thousand seven hundred bushels of wheat to be carried by canal, and delivered to the defendant as intermediate consignee at Troy. He delivered all but thirty bushels, which he either converted to his own use or lost. The defendant offered to pay the freight if Davis would deduct the value of this deficiency; but he refused to do so, and action was brought to recover the whole amount. The court held that the defendant had a right to make the deduction. Now, it is quite evident that that case differs from the present in all its legal bearings. It was not claimed there that any custom had changed the law of carriers applicable to the case, but the defense was rested upon general principles. It does not appear from the report that Davis disputed the deficiency being properly chargeable to him, and it was therefore clearly a case where the deduction could have been made by way of recoupment had the action been brought against the owner himself. And it was not held or intimated in that case that the carrier was liable to have deduction made for deficiencies for which as carrier he was not insurer against, or that the intermediate carrier had greater privileges in respect to deductions than were possessed by the owner. On the contrary, the whole reasoning of the case shows that the court considered the intermediate consignee as standing, in respect to the suit, in the place of the owner, bound to protect his interest, and entitled to all his defenses, but no more. In short, this case decides that a carrier suing to recover freight may collect the amount earned by him, less any loss occurring to the property while in his hands and properly chargeable to him as carrier; and the

question whether by custom he might be charged with other losses, or with supposed deficiencies not existing in fact, was not before the court, and there was no expression of opinion upon it.

The case of *Canfield v. Northern R. R. Co.*, 18 Barb. 586, is more nearly like the present in its facts than any other which has been reported, and it was there held that the intermediate carrier had no right to deduct from the freight earned the amount of a discrepancy between the bill of lading and the amount delivered to him, where it was shown that the discrepancy occurred by mistake in stating the amount in the bill of lading. But as the defense there was not rested on evidence of usage, the case cannot be considered an authority on the point now involved, and we have been unable to find any other that bears very directly upon it. We must therefore consider the custom in question upon general principles, and see whether it is capable of being sustained by them.

There are many customs which to a certain extent are convenient, but to which the law does not allow a compulsory force, either because they have never been generally acquiesced in, or because, to give them general application, would in some cases violate fundamental principles and rights. The law has established certain rules which are to test the legal validity of a custom; and we shall now examine the one alleged, in the light of the standard thus afforded.

1. Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute: Broom's Legal Maxims, 5th Am. ed., 828; see *Oelricks v. Ford*, 23 How. 49. It is not very clear that the evidence in this case establishes any such custom. The testimony of witnesses shows that the question of shortage is frequently the subject of dispute. Captain Elsie says: "The custom is sometimes acquiesced in by the captains of vessels, and sometimes disputed. If the shortage is small, they generally pay it; if it is large, they generally dispute it, and leave it to be settled by the owners." Mr. Stephenson, the general freight agent of the defendants, says: "I have known captains refuse to pay the shortage, but we always have the freight in our own hands before we settle. We invariably refuse to pay the captains until the two principals are agreed." Captain Montgomery, after testifying that the custom is universal, says: "I have known the question of shortage disputed at

least a hundred times." Several other witnesses give evidence that the custom is general, but the impression which the whole evidence leaves upon our minds is, that the deduction of shortage is submitted to when the carrier concedes that it is his fault, or where the amount is not beyond what is usual and incident to transportation; but that it is disputed in other cases. A custom varying the common law must be clearly proved; but we do not find clear evidence in this case that ship-owners concede their liability to have deductions made from freight earned for the value of property receipted for by mistake. That the railway companies assert the right is fully shown; but it must be generally assented to as well as asserted before the custom can be established.

2. Another essential to a good custom is, that it be certain. The evidence of usage in this case does not inform us whether, under it, the carrier is to have any remedy for the freight deducted, and if he is, whether that remedy is left to common-law rules, or is provided for by the custom itself. We will not assume that the carrier is to be deprived of all remedy, for that would be so manifestly unjust and unreasonable that it could not be seriously urged that the law should sanction it. And if he has any remedy, it must be either,—1. Against the consignor; or 2. Against the intermediate consignee; or 3. Against the owner or ultimate consignee. And it may be well to examine the grounds upon which either of the three may be held liable, as well as the reasonableness of remitting the carrier to a remedy against one rather than the others.

If the consignor was not himself the owner of the property, and had made no express contract with the carrier either for the payment of freight or for the delivery of any specific quantity, and that which was delivered was, by the bill of lading, deliverable to the consignee on payment of charges, the consignor could not be liable over to the carrier in a case like the present, except by the application of some rule unknown to the common law: *Parsons on Mercantile Law*, 352, and note; *Chitty on Carriers*, 208; *Barker v. Havens*, 17 Johns. 234 [8 Am. Dec. 393]; *Drew v. Bird*, Moody & M. 156. It might perhaps be suggested that the consignor, having undertaken to ship a certain quantity to the consignee, any payment to the latter for deficiencies may be recovered for, as a payment made to the use of the former; but any liability upon this theory must fall to the ground, if, in fact, the consignor was under no contract obligation to forward a specific quantity

to the consignee, or if, being under such obligation, he would still be in time under his contract to forward the balance afterwards. And while the consignor is still entitled to fulfill his contract, by delivery of the grain instead of paying its value, we do not perceive how any third party can be authorized, in correcting an error in part performance, to compel the consignee, who is entitled to grain, to accept, instead, its price at a distant point. Such a case would require ratification by both the consignor and the consignee before the former could be made liable to the carrier; and in the absence of ratification, the latter must seek his remedy elsewhere.

That the consignee or owner would be liable, where the amount deducted from the freight by the intermediate carrier had been forwarded to and received by him, there can be no doubt. If he receives all the property shipped to him, a sum of money paid in addition for a supposed deficiency not existing in fact is paid without any consideration, and he can have no claim to retain it. But if this alleged custom is legal and compulsory, and the carrier is remitted to the owner of the property for his remedy, we shall have here, perhaps, the first instance in the law where a person is required, by legal compulsion, to make a payment, or submit to an exaction, and then empowered immediately to sue and recover it back from the very person to whose use he has paid it.

But while the owner would be liable in such a case after the money has been paid to him, it is equally clear that at the common law the intermediate consignee would also be liable, at least until he had paid over the money, or in some manner changed his legal position relative to the owner with respect to the money after making the deduction. His position would be that of an agent to whom money had been paid for a principal not entitled to it; and that an action is maintainable against the agent under such circumstances is well settled: *Parker v. Bristol and Exeter R'y*, 7 Eng. L. & Eq. 528; *Snowden v. Davis*, 1 Taunt. 359; *Edwards v. Hodding*, 5 Id. 815; *Hearsay v. Pruyn*, 7 Johns. 179; *La Farge v. Kneeland*, 7 Cowp. 456; 1 Parsons on Contracts, 79; Smith's Mercantile Law, b. 1, c. 5, sec. 7. And treating this custom as perfectly valid, we do not see why this action is not properly brought against these defendants if the deduction was made under protest and they had not accounted with the owner of the corn when suit was commenced. Customs of this description are to be strictly construed, and we are not to assume that

they change the common law beyond what expressly appears: Broom's Legal Maxims, 5th Am. ed., 829. Assuming that defendants had the right to make the deduction at the outset, but that this does not deprive the plaintiff of all remedy we have only to see against whom the common law would give that remedy; and we cannot doubt that these defendants would be liable, either as consignees who had received property subject to charges, or as agents who had exacted money for a principal who has no right to retain it. The anomaly of allowing them to make the deduction, and then having it recovered back from them, is no greater than to allow a similar recovery from the ultimate consignee on whose behalf the deduction is made.

But we do not propose to place our judgment upon this ground exclusively, as we are clearly satisfied the custom itself cannot be enforced in the law.

3. All customs must be reasonable. If the one in question were confined to vesting in the intermediate consignee the same power to refuse to pay freight in cases in which the owner would be justified in doing so, it would not exceed the reasonable province of a mercantile usage. But it goes very much further when it makes the bill of lading conclusive in favor of the intermediate carrier, and allows him to make deductions for supposed deficiencies not in fact existing, which the owner himself would not be permitted to make. And it is specially unreasonable if it deprives the carrier of his lien, and remits to him a personal responsibility which he never relied upon, whether he is given a remedy in all cases against the consignor, or required to follow the money to the hands of the owner, who will usually reside at a point distant from the place where the exaction was made, and frequently in a foreign country. That such a custom may be convenient and operate justly in most cases is very true, but it can only rest for its observance on the consent of parties.

The courts are frequently required to hold a custom unreasonable and void, notwithstanding strong reasons urged in favor of it as a rule of convenience by the class by whom it has been adopted, and where the hardships in any case would not be greater than in this. The case of *Leuckhart v. Cooper*, 3 Bing. N. C. 99, is an illustration of such cases. The usage given in evidence there was for public warehousemen in London to have a general lien on all goods from time to time housed with them for and in the name of the merchants or

other persons by whom they were employed, for all moneys or balances due from such merchants or persons for expenses incurred about goods consigned from abroad, and irrespective of the ownership of the goods upon which lien was claimed. In *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131, a custom for the master of a vessel stranded to sell the cargo without necessity was held void. In *Bowen v. Stoddard*, 10 Met. 380, a custom among merchants of New Bedford and Fairhaven engaged in the whaling trade, to accept the bills of their masters, drawn for supplies furnished abroad, failed to receive the sanction of the court, on the ground that a usage could not be reasonable which put at hazard the property of the owner at the pleasure of the master. And see *Jordan v. Meredith*, 3 Yates, 318 [2 Am. Dec. 373], and *Spear v. Newell*, referred to in 23 Vt. 159. Some of the cases cited were more liable to work injustice generally than the present; but as a custom, if good at all, is compulsory on all cases falling within it (1 Bla. Com. 78), we are not at liberty to regard it exclusively in the light of its effects in the majority of cases. Special customs are so liable to create confusion of legal rules in directions not contemplated in their adoption, that they are admitted into the law with great reluctance; and it is not often a hardship to parties to reject a custom so long as they are left free to make their own bargains, and can incorporate it in their contracts if they see fit to do so.

We have not deemed it necessary to consider how far, if the custom were certain and valid, an adjustment between the two carriers for an actual loss or conversion could be binding on the owner in the absence of ratification by him, or how far a similar adjustment for a supposed deficiency which did not exist at all could bind either the consignor or the consignee. It is sufficient that there are in the usage elements which prevent its being accepted in the law as a compulsory custom. We think the circuit judge erred in holding it valid, and the judgment must be reversed, and judgment entered for the plaintiff in this court for the amount claimed, with interest.

The other justices concurred.

CARRIER'S LIEN FOR FREIGHT UPON GOODS TRANSPORTED: *Briggs v. Boston etc. R. R. Co.*, 83 Am. Dec. 626, and cases collected in note 632; lien of connecting carrier: *Wells v. Thomas*, 72 Id. 228, note 243.

CONSIGNOR IS LIABLE FOR FREIGHT, though bill of lading contains a stipulation for payment by the consignee: *Holt v. Westcott*, 69 Am. Dec. 74.

COMMON CARRIER MAY ADVANCE TO FORWARDING AGENT OF GOODS the existing charges upon them, and the consignees and owners are liable to refund the same, and no private arrangements of the consignee with the forwarding agent will affect the right of the carrier to recover: *White v. Vann*, 44 Am. Dec. 294.

BILL OF LADING, HOW FAR MAY BE WAIVED OR VARIED BY PAROL: *Morrison v. Davis*, 57 Am. Dec. 695; *Chandler v. Sprague*, 38 Id. 409, note; *Atwell v. Miller*, 69 Id. 206. Compare *Cox v. Peterson*, 68 Id. 145. When parol evidence of custom is admissible to explain recital in bill of lading, see *McClure v. Cox*, 70 Id. 552, and note 555.

CUSTOMS OR USAGE, REQUISITES TO VALIDITY OF: *Dickinson v. Gay*, 83 Am. Dec. 656; *Boardman v. Spooner*, 90 Id. 196; *Reed v. Richardson*, ante, p. 155, and note.

THE PRINCIPAL CASE IS CITED to the point that intermediate consignees have been long known and recognized in the law of shipping, in *Michigan Cent. R. R. Co. v. Lantz*, 32 Mich. 509; and is cited to the point that, as between the shipper of goods and the owner of the vessel, a bill of lading is open to explanation as to the quantity of the goods, their condition, etc., in *Glass v. Goldsmith*, 22 Wis. 494.

UNDERWOOD v. McDUFFEE.

[15 MICHIGAN, 361.]

REFEREE IS NOT OFFICER WITHIN MEANING OF CONSTITUTIONAL PROVISION requiring all executive and judicial officers to be sworn before assuming their duties.

JUDICIAL POWER, IN CONSTITUTIONAL SENSE, IS NOT EXERCISED BY REFEREE in determining facts in a cause submitted to him, but by the court in giving judgment.

IN AMENDING LAW, LEGISLATURE MAY SUBSTITUTE ANY PROVISION they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted.

ACTION of *assumpsit*. The cause was referred by stipulation, and the referee found for the plaintiff. The opinion states the case.

Newberry and Pond, for the plaintiff.

D. L. Pratt and C. Kent, for the defendant.

By Court, CAMPBELL, J. In this case, the parties in the court below consented to a reference of the matters put in issue by the pleadings to a referee of their own nomination, who heard the case and made his report. Exceptions were taken to it, which were overruled, and judgment was entered on the finding. The cause is now brought before this court on questions chiefly relating to the validity of the reference, and the authority of the referee.

It is first objected that the referee was not sworn. The statute does not require this, but it is claimed that the constitution of this state requires all executive and judicial officers to be sworn before they assume their duties: Const., art. 18, sec. 1. The oath required is the oath of allegiance to the United States and to the state, and an oath to perform faithfully the duties of the office. The term "officer" as there used can only be taken to refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. A designation of a person to do some one act of duty, with no official tenure except as incident to that transitory function, cannot make him a public officer without involving a great absurdity. Every public office includes duties which are to be performed constantly, or as occasion arises, during some continuous tenure. And no public office can depend upon the will of private persons, who may call it into existence for their own purposes and at their own pleasure. In the proceedings under consideration, a referee is appointed only when parties consent, or waive their right to a jury; and the designation may be made by their private stipulation, and is confined to the particular suit. We have no difficulty in holding that such a referee cannot be within the operation of the constitution as an officer of any kind.

It is also urged that the statute creating the existing system of references is invalid as not in any proper sense an amendment of the prior statutes, although purporting to be such. The constitution declares that no law shall be amended or altered by reference to its title only, but that the sections altered or amended "shall be re-enacted and published at length." The law in question was designed to remodel the entire system of references, and in lieu of several sections of the former statutes, a series of new sections was adopted, each in the room of an old one. The objection pointed out is, that some of the new sections bear no resemblance to those superseded, but relate to a different class of details. We can see no illegality in this. There is no principle which can prevent the legislature from substituting any provision they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted. There is no other constitutional check that we have been able to discover, and in the absence of any, it certainly belongs to the legislative power to exercise its discretion in the matter.

The principal objection to these proceedings is claimed to be found in the clauses of the constitution which vest all the judicial power of the state in courts, and which provide how those courts shall be constituted, and, as is argued, leave no room for judicial action elsewhere. The judicial power, even when used in its widest and least accurate sense, involves the power to "hear and determine" the matters to be disposed of; and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial. A master in chancery often has occasion to consider questions of law and of fact, but no one ever supposed him to possess judicial power. A jury in a court of record determines all the facts in the case, but the judicial power is in the court which enforces the verdict by judgment. This view is very clearly explained by Kent, C. J., in *Tillotson v. Cheetham*, 2 Johns. 63 [3 Am. Dec. 459], where it was held that the sheriff himself, when presiding over a jury of inquest, acted ministerially, because he had no power to give judgment: See also Story on Const., secs. 1640 et seq.; *Daniels v. People*, 6 Mich. 381; *Chandler v. Nash*, 5 Id. 409. It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it.

Our constitution, in ordinary civil cases, dispenses with a jury unless demanded. The facts, therefore, must usually be settled by other than common-law means. The cause may be, and in most cases will be, heard by the court itself upon facts and law, and we are not now required to consider how far this right may be restricted. But it is unquestionably within the power of the parties to stipulate upon the facts, or for the amount of judgment, and thus save the court the labor of determining anything but the law, or even of doing anything beyond entering the judgment. This substitution of the private agreement for the verdict cannot be seriously claimed to be an invasion or usurpation of judicial functions. Should the parties even agree that certain facts would appear if certain testimony were admissible, and by their stipulation submit the cause upon more than one hypothesis, according as

certain proofs should be received or rejected, there would certainly be no such usurpation. This statute does nothing more, in reference to preparing facts for submission to the judgment of the court, than if the parties themselves determined them by stipulation. Instead of doing this, they agree that they will allow a common agent or arbiter to examine into the facts and present his various conclusions, and, if required, the means and principles whereby he was enabled to arrive at them. They accept the machinery provided by the statute, in lieu of imposing any conditions of their own devising. The court receives the conclusions of this arbiter of the parties, gives each of them an opportunity of showing whether he has kept within the rules of the authority conferred upon him, in receiving or rejecting evidence, or in any other action, and if satisfied he has complied with his duty, gives judgment accordingly. We can perceive no difference in law between an agreement that a fact exists and an agreement that the determination of a chosen umpire shall decide upon its existence. The conclusion in either case is the result of a stipulation, in one instance acting directly, and in the other by an intermediate agency.

When this common agent has performed his duty, and submitted his conclusions to the court, then the judicial power is exercised upon all that the parties have seen fit to leave to its action, by giving a binding judgment such as in law is warranted by this finding. But until this judgment is given, it has precisely the same force as if the parties had joined in a written stipulation, embracing the findings of the referee and the statutory provisions determining what effect should be given them. No one has ever questioned the power of the legislature to allow judgments by confession; and if such judgments, where the parties settle their own conclusions, do not infringe the judicial power, we can see no more reason for objection to references, where the consent of the parties is a condition precedent to the proceedings.

We are not required in this case to consider whether any, and if so what, compulsory authority might be granted to referees *in invitum*. No party who has consented to their appointment can object to their conclusions except where they violate the rules of law; and then he must follow the statute which he has by his own consent made the rule of proceeding.

We do not think the constitution prevents such references

by consent. And we think there is no error in the proceedings.

The judgment must be affirmed, with costs.

The other justices concurred.

REFEREE, AND FUNCTIONS OF, under Minnesota statute: *Carson v. Smith*, 77 Am. Dec. 539.

POWERS OF REFEREE: *Cook v. Carpenter*, 80 Am. Dec. 670; power of court to send ordinary action to: *Grim v. Norris*, 79 Id. 206, and extended note 207.

REFEREE'S REPORT, WHEN SET ASIDE FOR UNCERTAINTY, *Doyle v. Reilly*, 85 Am. Dec. 582; and see *Olcott v. Tioga R. R. Co.*, 84 Id. 298.

ERROR ON TRIAL BEFORE REFEREE as ground for new trial: *Beach v. Cooke*, 86 Am. Dec. 260.

AMENDMENT OF STATUTE, WHAT PROVISION CONTROLS: See *Scobey v. Gibson*, 79 Am. Dec. 490, and note 494; *Wright v. State*, 61 Id. 90; *Coffin v. Rich*, 71 Id. 559.

THE PRINCIPAL CASE IS CITED to the point that amendments of statutes are not forbidden by the provisions of the Michigan constitution, in *Mok v. Detroit etc. Savings Assoc.*, 30 Mich. 522; *Harrington v. Wands*, 23 Id. 389; and is cited in pointing out the distinction between judicial action and legislative action, in *Shumway v. Bennett*, 29 Id. 457.

TILLMAN v. SHACKLETON.

[15 MICHIGAN, 447.]

LIABILITY OF MARRIED WOMAN ON CONTRACT RELATING TO SOLE PROPERTY.

—A married woman, living with her husband, kept a boarding-house with his consent, and controlled the entire business: *held*, that a contract of purchase made by her in her own name for the purpose of such business must be regarded as a contract in relation to her sole property, upon which she was personally liable under the Michigan statute relating to married women.

ACTION of *assumpsit* brought to recover the price of certain furniture purchased by the defendant to be used by her in her business as a boarding-house keeper. Judgment for the plaintiffs. The opinion states the case.

C. J. O'Flynn and G. V. N. Lothrop, for the plaintiffs.

J. Caplis and F. H. Canfield, for the defendant.

By Court, CHRISTIANCY, J. This suit was originally brought by the plaintiffs in error against the defendant in error in a justice's court, to recover the price of certain furniture sold to defendant. The justice rendered judgment for the plaintiffs for \$220 and costs.

The defendant removed the cause to the circuit court by *certiorari*, where the judgment of the justice was reversed, and the original plaintiffs have brought the cause to this court by writ of error to reverse the judgment of the circuit court.

It appears by the return of the justice to the *certiorari* that on the trial of the cause before him, it was admitted by the parties that the plaintiffs in that suit "sold, and the defendant purchased in her own name, certain furniture of the value of \$220; that at the time of said sale and purchase the defendant was a married woman, living with her husband in a house in Detroit, which was kept as a boarding-house; that she had the sole control and management of the house, and received the pay of the boarders; that the furniture, to recover the value of which this suit was brought, was purchased by her for said boarding-house, and that it was used for such purpose; and that her said husband had nothing to do with the management of said boarding-house, and received none of the profits arising therefrom."

If this evidence fairly tends to show a state of facts which would warrant the judgment rendered by the justice, then it could not properly be reversed on *certiorari*, though the circuit court or this court were of a different opinion upon the weight of the evidence.

We think the evidence clearly tended to show: 1. That the wife was carrying on the business of keeping a boarding-house exclusively on her own account, with the consent of the husband; that she was the sole proprietor of the business, and of the property necessarily incident to it, such as the supplies, and the money received for board, and that the husband had in fact no control or management of the business; and 2. That the sale of the furniture was made to her on her own credit, and not upon that of the husband, and that it was purchased for and used in that separate business. Such, we think, the justice was well authorized to find from the evidence to be the state of facts; and if at liberty to weigh the evidence, we could not find otherwise. To render the husband liable at all, even at common law, for this furniture, the sale must have been made in some way upon his credit, whereas it appears to have been made upon the sole credit of the wife: *Metcalfe v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunt. 356; *Leggat v. Reed*, 1 Car. & P. 16; *Stammers v. Macomb*, 2 Wend. 454; *Shelton v. Pendleton*, 18 Conn. 417. This furniture does not appear to come within the range of ordinary necessities

for the use of the family, nor does it appear that the goods came to the use of the husband (if either of these facts would render him liable when the credit was not given to him).

The question of the wife's liability, however, depends upon our statute in reference to married women: Act of 1855, as amended in 1857; see Comp. Laws, secs. 3292-3295.

By the first section of this act all the property, real and personal, to which the wife "may become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain her estate and property, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with the like effect as if she were unmarried."

By the second section, any person who may hold any property, real or personal, as a trustee for any married woman, may convey to her all or any of the property, or the rents, issues, and profits thereof, for her sole and separate use and benefit.

By the third section actions may be brought by and against her in relation to her sole property, "in the same manner as if she were unmarried." This section would doubtless of itself, in connection with the first, without the aid of the fourth section, render valid her contracts in reference to her sole property already acquired.

But by the fourth section it is provided that the husband of any married woman shall not be liable to be sued upon any contract made by such married woman in relation to her sole property, and the wife shall be liable to be sued upon any contract or engagement made by her in cases where her husband is not in law liable, or where he refuses to perform such contract or engagement. Whether this section renders the wife competent to make any contract having no relation to her sole property, is a question which I do not think necessarily involved in the present case, because I think the facts admitted clearly tended to show, not only that the wife was the sole proprietor of the business of keeping the boarding-house (which of itself may be regarded as coming fairly within the equity and spirit of the statute as a sole property), but that she had the sole property, at least in the income of the business; and this furniture being purchased by her upon her own credit, and not that of the husband, for the benefit of and to be used in carrying on that business, she had full

power to bind herself by the contract of purchase; and that such contract, as well as the action upon it, was "in relation to her sole property," unless it shall be found that she had no power to carry on the business in question on her separate and individual account, and that the business and the property incident and necessary to its prosecution must have vested in the husband.

We have already held that a husband may under this statute convey land by deed directly to his wife, and where there are no conflicting claims of the husband's creditors involved, and it is not done for the purpose of shielding his property from his creditors, we can see no legal objection to her acquiring any amount of property directly from the husband and holding it as her sole property.

And as to the right of the wife to carry on a separate business upon her own means and credit, while a majority of the court in *Glover v. Alcott*, 11 Mich. 471 (where the question was one of fraudulent concealment of the husband's property to defraud creditors), held that the wife could not carry on upon credit the general trade or business of a flouring mill, buying wheat and manufacturing and selling flour, the proper attention to which would require all her time and services, and render her incompetent to attend to the duties of her household; yet in that case it was intimated that it was not intended to include within the rule there laid down "any business usually carried on by females, and which consists largely and almost necessarily of female labor, such, for example, as that of a milliner." The present is a case which comes clearly within the exception there intimated,—a case in which the wife almost of necessity becomes practically the head and manager of the business. And we can see no legal objection, where the husband assents to her carrying on the business of keeping a boarding-house as her own separate business and upon her own account, either upon cash or credit, and we think under the facts of this case she must be held competent to make the contract of purchase for the furniture purchased for and used in her separate business.

The husband's rights are not injured by it. He is in no respect bound by her contract when the credit is not given to him, and satisfaction of her personal liability can only be enforced against her sole property. We think her contract of purchase comes within the fourth section of the act, and that

the judgment of the circuit court should be reversed, and that of the justice affirmed, with costs.

COOLEY, J. I agree with my brother Christiancy that the defendant was liable for the purchase under the circumstances appearing in this case, and that the judgment of the circuit court should be reversed. I do not place my concurrence, however, on the peculiar nature of the business for which the purchase was made, or regard her contract as depending for its validity on the question whether the defendant was previously possessed of any sole property. There never was any impediment to the acquisition of property through purchase by a married woman; the difficulty was, that at the common law the ownership passed immediately to the husband by virtue of the marriage relation. The statute (Comp. Laws, sec. 3292) establishes a new rule by providing that the property, however acquired, shall be and remain the sole property of the wife, with the same power of control as if she were unmarried. Another section (3295) provides that the husband shall not be liable to be sued upon any contract made by her in relation to her sole property, but that the wife shall be; and I think a contract of purchase is within this section, whether she had property before or not. The contract is for the acquisition of sole property, and her title to it, or at least a right in relation to it, vests when the contract is made.

There is, therefore, no straining of terms in saying that the contract has relation to her sole property. The statutes on this subject establish a new system, and are to be construed with a view to give them the effect designed by the legislature, rather than with an effort to retain as much as possible of an old system which they were meant to displace. The rule which they establish is one of general capacity to own property, and to make valid contracts, binding at law and in equity, in relation to it; and I discover nothing in the statute which so limits that capacity as to prevent her making the first acquisition, any more than any subsequent one, on credit. Although it was once held (*Brown v. Fifield*, 4 Mich. 322) that even the constitutional provision on this subject was to receive a strict construction, because contravening the common law, the subsequent decisions have been based on a different principle, and justly, as I think, have recognized the change designed to be made as quite radical in its nature. And I should be unwilling to lay down any rule which should seem

to put upon the wife's power to make contracts on her own behalf any limitations based upon a strict or technical construction of the statute.

While, therefore, I agree fully with the opinion of my brother Christianity, I do not base my judgment exclusively upon the views which he has presented, but should think the action sustainable, notwithstanding some of the circumstances upon which he remarks were absent from the case.

CAMPBELL, J., concurred.

MARTIN, C. J. I do not concur with my brethren. I cannot hold that a wife living in her husband's home with him can be made liable for necessary household obligations.

CONTRACTS OF MARRIED WOMAN ARE VOID AT COMMON LAW: *Stephenson v. Osborne*, 80 Am. Dec. 358, and cases collected in note 367; and see *Weisbrod v. Chicago etc. R. R. Co.*, 86 Id. 743.

POWER OF MARRIED WOMAN TO DISPOSE OF OR CHARGE her separate estate under enabling statutes: *Maclay v. Love*, 85 Am. Dec. 133, and note 144; *Kirkpatrick v. Buford*, 76 Id. 363, and note 367, containing provisions on the subject from the statutes of the several states.

WIFE CAN ACQUIRE NO SEPARATE PROPERTY IN HER EARNINGS, except by gift from her husband, even where she carries on business in her own name: *Belford v. Crane*, 84 Am. Dec. 155; and see *McLemore v. Pinkston*, 68 Id. 167.

WHEN SEPARATE ESTATE OF MARRIED WOMAN IS CHARGEABLE with her debts and contracts: *Yule v. Dederer*, 72 Am. Dec. 503, and note 513; S. C., 78 Id. 216, and note 226.

THE PRINCIPAL CASE IS CITED to the point stated in the *syllabus*, and the doctrine affirmed, in *Campbell v. White*, 22 Mich. 185; *De Vries v. Conklin*, 22 Id. 259; *Rankin v. West*, 25 Id. 200; *West v. Laraway*, 28 Id. 465; and is cited to the point that when a contract by a married woman is relied upon, it becomes necessary to show the facts, in order that it may be seen that they were such as would enable her to make the contract, in *Edwards v. McEnhill*, 51 Id. 166.

WILBUR v. FLOOD.

[16 MICHIGAN, 40.]

CROSS-EXAMINATION—INQUIRY INTO ANTECEDENTS AND CHARACTER OF WITNESS. — Witnesses may be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. It is within the discretion of the court how far this inquiry may go, but within this discretion a witness may be asked concerning all antecedents which are really significant.

WITNESS MAY BE ASKED, ON CROSS-EXAMINATION, IF HE HAS EVER BEEN CONFINED IN STATE PRISON. It is not necessary to produce the record of the conviction.

RESCISSION OF CONTRACT FOR FRAUD. — Where one exchanges a lot of personal property for certain land, and the owner of the land delivers to him a conveyance describing the wrong land, if the first party wishes to rescind for the fraud he cannot do so by a mere offer to "trade back"; he must deliver or tender a reconveyance.

PREMATURE ACTION. — In replevin, to recover chattels given in consideration for a contract which plaintiff wishes to rescind for fraud, the rescission must be complete, by return or tender of the consideration, before the affidavit is made and the writ issued.

PERSON WISHING TO RESCIND CONTRACT FOR FRAUD MUST DO SO WITHIN REASONABLE TIME, or their right is lost. A delay of fifteen months between neighbors to repudiate a fraudulent exchange is unreasonable.

REPLEVIN. The opinion states the case.

H. F. Severens, for the plaintiff in error.

Soule, Mason, and Allison, for the defendant in error.

By Court, CAMPBELL, J. An action of replevin was brought by Flood against Wilbur, to recover certain chattels which Flood had exchanged with Wilbur for lands which the latter had failed to convey, having substituted a different description. The facts as claimed were in substance these: In exchange for the horses, wagon, and harness, which are the subjects of this suit, Wilbur was to deed a clear title to the northeast ten acres of a certain forty-acre lot which he said he owned. About the beginning of June, 1864, Wilbur gave Flood a deed of an undivided fourth of the forty acres, instead of the specified ten acres, and it was four or five days before the latter discovered the error, when he "offered to trade back, and Wilbur would not do it."

No further steps appear to have been taken until this suit was commenced. The affidavit was made September 2, 1865, and the writ issued September 5th, and delivered to plaintiff's attorneys. On or about the 18th of September, a clerk of the attorneys went with the sheriff to Wilbur, and tendered him a deed of the premises which he had conveyed to Flood. Upon his refusal to accept it, the clerk gave the writ to the sheriff, who served it.

Defendant was sworn as a witness in his own behalf, and controverted the plaintiff's case. Upon cross-examination he was allowed, against objection, to be asked whether he was ever confined in the state prison, and an exception is taken to this ruling. It is claimed to have been erroneous, as an attempt to discredit the witness by improper means, and to prove by parol what rests in record evidence. We do not

think the objection tenable. It has always been found necessary to allow witnesses to be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. To this end a large latitude has been given, where circumstances seem to justify it, in allowing a full inquiry into the history of witnesses, and into many other things tending to illustrate their true character. This may be useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe, and such a knowledge is often very desirable. It may be quite as necessary, especially where strange or suspicious witnesses are brought forward, to enable counsel to extract from them the whole truth on the merits. It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or less extent, in the judgment of all persons, and there must be some means of reaching this history. The rules of law do not allow specific acts of misconduct, or specific facts of a disgraceful character, to be proved against a witness by others. He may be proved by record evidence to have been convicted of infamous crimes, but not to have done other infamous deeds, nor to have undergone personal disgrace. And even as to previous conviction of infamous crimes, the rule is seldom of any great service, because no one can be expected to know in advance what witnesses may appear, nor what may have been their history. Unless the remedy is found in cross-examination, it is practically of no account.

It has always been held that within reasonable limits a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will, or should, prevent any needless or wanton abuse of the power. But within this discretion we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a state prison may be an important fact for this purpose. And it is not very easy to conceive why this knowledge may not be as properly derived from the witness as from other sources. He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity.

If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well-established rules of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian. We are satisfied there was no error in admitting this testimony.

The court was also asked, but declined, to charge that if the writ in this cause was issued before the reconveyance to Wilbur was tendered, the plaintiff could not maintain his action. The court also declined to charge that plaintiff was bound to rescind within a reasonable time after he discovered the facts complained of, and that the period between June, 1864, and September, 1865, was not a reasonable time; but charged that if he offered to trade back within four or five days after discovering the mistake in the deed, and defendant refused, the tender of a reconveyance in September, 1865, was within a reasonable time.

In all these respects we think the court erred. A mere offer to trade back is no rescission of a contract. The party aggrieved must do what he can to place the other *in statu quo*; and where it is possible, this can only be done in cases like the present by a return, or a tender of a return, of what he has received in exchange for what he has given. In the case of land, this can only be done by conveyance. And the property cannot revert without such an attempt to rescind. Under our statutes, the affidavit is essential before writ of replevin can be served, and it must show a wrongful detention of plaintiff's property. But till the deed was tendered, plaintiff could have no property in the chattels, and the suit was prematurely brought.

But there was also error in respect to the ruling concerning diligence. It is an inflexible rule that a party complaining of fraud must be guilty of no unreasonable delay in repudiating and getting rid of his contract. Where his object is to rescind it and reclaim his property, he is bound to lose no time unnecessarily in his action to that end. While no particular period can be laid down for all cases, yet it is quite well settled that no unnecessary delay can be permitted; and in the absence of some proof to excuse it, any considerable lapse of time must be conclusive evidence of neglect. Where such proof is

introduced, each case must depend upon its own circumstances. It would be absurd to suppose that a party could not prepare and tender a deed in his own neighborhood in a few days under any ordinary circumstances. And a delay of fifteen months in such a case can only be regarded as very great negligence, which must preclude the party from treating the contract as rescinded, and the property as having become restored as if no contract had ever been made.

The judgment below must be reversed, with costs, and a new trial must be granted.

CHRISTIANCY and COOLEY, JJ., concurred.

MARTIN, C. J., did not sit.

WITNESSES. — Disparaging questions not relevant to issue, and put for the express purpose of discrediting a witness, or to otherwise degrade him, should be allowed in the court's exercise of a wise discretion, when they will promote the ends of justice, but excluded when they seem unjust to the witness, and uncalled for by the circumstances of the case: *Turnpike Road Co. v. Loomis*, 88 Am. Dec. 311. In this case, and the note to the same, this question is discussed at length. The principal case is cited to this point in *Clements v. Conrad*, 19 Mich. 174, 183; *Dickinson v. Dustin*, 21 Id. 565; *People v. Monegan*, 29 Id. 7; *Driscoll v. People*, 47 Id. 417.

RESCISSION. — Party electing to rescind a contract must restore what he has received under it, or pay its value, as a prerequisite condition: *Woodbury v. Woodbury*, 90 Am. Dec. 555. One rescinding must place the other in as good condition as he was before: *Downer v. Smith*, 76 Id. 148. He must, immediately upon discovering the ground of the rescission, give notice of his intention to rescind, and return the property: *Hoadley v. House*, 76 Id. 167. Laches or acquiescence will bar a person's right to rescind: *Goshen Township v. Shoemaker*, 80 Id. 386.

RESCISSION, HOW AND WITHIN WHAT TIME MUST BE EXERCISED: See note upon this subject to case of *Bryant v. Isburgh*, 74 Am. Dec. 617.

PARTICEPS CRIMINIS IN ADULTERY may be asked all questions relating to the offense; but when the questions are answered and denied, other witnesses cannot be called to prove the denials false: *People v. Knapp*, 42 Mich. 268, citing the principal case.

WHEN PROPERTY IS OBTAINED THROUGH FRAUD, under color of purchase, the vendor may rescind, and is entitled to demand and receive back the property on returning within a reasonable time what he has received, and placing the vendee in *statu quo*: *Morrison v. Berry*, 42 Mich. 396, citing the principal case.

McMILLAN v. MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD.

[16 MICHIGAN, 79.]

RAILROAD COMPANY ACTING UNDER SPECIAL CHARTER, WHICH LEASES LINE CONSTRUCTED UNDER GENERAL RAILROAD LAW, with respect to the business transacted by them on said leased road, are governed by the provisions of the general railroad law, and cannot claim the benefit of such exemptions as are contained in their original charter.

WHEN DOES COMMON CARRIER'S LIABILITY AS SUCH CEASE, AND HIS LIABILITY AS WAREHOUSEMAN COMMENCE? Upon this question the courts have held three positions: 1. That this occurs when the goods are placed in a warehouse to await delivery to the consignee; 2. That after they have been placed in a warehouse, the carrier's liability as such continues until the consignee has had a reasonable time in which to remove them; 3. That the carrier's liability continues until he has notified the consignee of the arrival of the goods, and he has had reasonable time in the ordinary course of business to remove them.

LIABLE AS CARRIER OR WAREHOUSEMAN. — A common carrier's liability for goods transported by him continues as a carrier until the goods have been placed in a warehouse and the consignee notified of their arrival, and he has had a reasonable time in which to remove them. After that the carrier becomes liable as a warehouseman. *Per* Cooley and Christianity, JJ.; *contra*, Martin, C. J., and Campbell, J.

COMMON CARRIERS — LIMITING LIABILITY BY NOTICE OR CONTRACT. — The provision of the general railroad law preventing railroad companies from lessening or abridging their common-law liabilities as carriers does not prevent the company from entering into an agreement with a consignor of goods by which he specially contracts to limit their liability.

COMMON CARRIER — OBLIGATION TO RECEIVE GOODS — LIMITING LIABILITY. — Carrier by mere notice may make reasonable regulations in regard to the receipt and delivery of goods to him, but, subject to such reasonable regulations, he is bound to receive all articles tendered to him of the kind usually carried by him, subject to his common-law liability, unless the owner consents to his receiving them under a reduced liability.

BURDEN OF SHOWING SPECIAL CONTRACT WITH CARRIER LIMITING HIS COMMON-LAW LIABILITY is on the carrier, and the fact that a restrictive notice has been actually received or seen by the owner of the goods will not raise a presumption that he has assented to its terms.

ANY NUMBER OF PAST TRANSACTIONS BY WHICH CONSIGNOR AGREED WITH CARRIER TO LIMIT HIS COMMON-LAW LIABILITY does not prevent him from insisting on his common-law rights in subsequent shipments; nor will carriers be allowed to establish a usage restricting his liability.

BILL OF LADING — PROVISION IN LIMITING CARRIER'S LIABILITY. — Bill of lading is the contract between the owner and the carrier of goods delivered for transportation; it fixes the rights and liabilities of the parties when its terms have been agreed upon, including a provision limiting the carrier's liability, and the consignor's assent is conclusively presumed from his having accepted it without objection.

FACT THAT CONSIGNOR DID NOT READ BILL OF LADING DELIVERED TO HIM, which contained restrictions of the carrier's liability, does not prevent his being bound by its terms, if there was no fraud practiced upon him.

CONSIGNEE ACCEPTING SHIPMENT IS BOUND BY TERMS OF SHIPMENT MADE BY HIS CONSIGNOR; and the carrier in contracting with the consignor has a right to presume that he has full power in the premises.

CONSIDERATION FOR AGREEMENT BY SHIPPER RESTRICTING CARRIER'S COMMON-LAW LIABILITY will be presumed, in the absence of evidence to the contrary.

NOT NEGLIGENCE. — Where a railroad company transports highly inflammable material, and then delivers it over to a second carrier, where it occasioned a conflagration, the company cannot be held liable for the damage, as if their carrying the material, if negligence, was too remote a cause to charge them.

COMMON CARRIER — TRANSPORTATION BEYOND HIS LINE. — Where a carrier receives goods marked for a particular destination beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line, and forward from its terminus.

COMMON CARRIER — CONNECTING LINES — CONTRACT LIMITING LIABILITY. — Where goods were delivered to a carrier at Cincinnati, and he gave a bill of lading conditioned to deliver them "at Toledo, for Detroit," this is a contract to carry the goods to Toledo and to forward them from thence to Detroit. And where the bill of lading contained provisions limiting the carrier's liability, these provisions only related to the shipment to Toledo, and the carriage from thence was under the carrier's common-law liability.

THE opinion contains a sufficient statement of the case.

Maynard and Meddaugh, and C. I. Walker, and D. C. Holbrook, for the plaintiffs.

H. H. Emmons and W. Wing, for the defendants.

By Court, COOLEY, J. The first question to be considered in this case is, whether the defendants, in respect to the business transacted by them on the line of the Detroit, Monroe, and Toledo railroad, are subject to the liabilities imposed by the general railroad law of the state, under which the road named was constructed, or may claim the benefit of such exemptions as are contained in their original charter. As the charter expressly provides that for goods in deposit awaiting delivery the company shall be liable as warehousemen only (Laws of 1846, p. 185), and contains no prohibitory clauses which would prevent their making any contract which it is lawful for a common carrier to make, while the general law prohibits any company formed under it from lessening, or directly or indirectly abridging, their common-law liability as carriers (Comp. Laws, sec. 1992), it is possible that important consequences may depend upon the determination of this question.

The doubt, if any, springs from that provision in the general railroad law which authorizes any railroad company in the state to "make any arrangements with other railroad companies, within or without this state, for the running of its cars over the road of such other company, or for the working and operating of such other railroads as said companies shall mutually agree upon: Comp. Laws, sec. 1993. The defendants are lessees of the Detroit, Monroe, and Toledo road, and while they admit that all those provisions of the general railroad law which measure the extent of property rights prescribe the width of the road, the mode of use, speed, ringing of bells, or the manner of enjoyment, must be applicable to them as lessees, as defining and constituting a part of the right itself, yet they claim that obligations springing from the use depend upon their own charter, under which alone the contracts are to be made or the acts done from which the obligations spring.

I have been unable to discover anything in the general railroad law which supports this distinction, or which indicates an intention on the part of the legislature that the lessee of a road constructed under that law should take the road discharged of any of the conditions or burdens imposed for the benefit of the public upon the lessor. The authority to "work and operate" the road of a corporation does not necessarily imply that the operating is to be otherwise than under the obligations imposed upon the corporation by its charter; and as grants of corporate franchises are to be construed with strictness (2 Kent's Com. 298; *Charles River Bridge v. Warren Bridge*, 11 Pet. 544; *Perrine v. Chesapeake etc. Canal Co.*, 9 How. 172; *Bradley v. New York etc. R. R. Co.*, 21 Conn. 294; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 24 N. Y. 87; S. C., 3 Wall. 51), we are not at liberty to infer an intent in the legislature to relieve the road in the hands of the lessee from obligations resting upon the lessor, unless such intent is clearly expressed, or at least is necessarily to be inferred. There is no such clear expression in the present case, and the inference I think is against any such intent. The legislature by the general law established the rules under which they would allow new roads to be constructed and operated; and when they gave permission to the proprietors to lease them to others, it is to be presumed, in the absence of any declaration to the contrary, that the intention was not to dispense with those regulations which they have judged important for the public interest and protection.

The power to lease does not imply the power to transfer greater rights than the lessor himself possesses; and where the obligations assumed by the lessor pertaining to the management of his business and the liabilities which should spring therefrom were the consideration upon which the franchise was granted, it would be a violent inference that the legislature designed to waive them when they are no less important to the public protection after the lease than before.

I think, therefore, that the liability which rests upon these defendants is that of the Detroit, Monroe, and Toledo Railroad Company, which by law is not permitted to lessen or abridge its common-law liability as common carriers. What that liability is, when they have transported property over their road and deposited it in their warehouse to await delivery to the consignee, is the next question demanding consideration.

On this point, three distinct views have been taken by different jurists, neither of which can be said to have been so far generally accepted as to have become the prevailing rule of the courts.

1. That when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only. This is the rule of the Massachusetts cases: *Thomas v. Boston etc. R. R. Co.*, 10 Met. 472, and *Norway Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray, 263 [61 Am. Dec. 423], and those which follow them.

2. That merely placing the goods in the warehouse does not discharge the carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business: *Morris and Essex R. R. Co. v. Ayres*, 29 N. J. L. 393; *Blumenthal v. Brainerd*, 38 Vt. 413; *Moses v. Boston and Maine R. R. Co.*, 32 N. H. 523 [69 Am. Dec. 381]; *Wood v. Crocker*, 18 Wis. 345; *Redfield on Railways*, 3d ed., sec. 157.

3. That the liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time in the common course of business to take them away after such notification: *McDonald v. Western R. R. Corp.*, 34 N. Y. 497, and cases cited; 2 *Parsons on Contracts*, 5th ed., 189; *Angell on Carriers*, sec. 813; *Chitty on Carriers*, 90.

The rule as secondly above stated proceeds upon the idea

that the consignee will be informed by the consignor of any shipment of freight, and that it then becomes the duty of the former to take notice of the general course of business of the carrier, the time of departure and arrival of trains, and when, therefore, the receipt of the freight may be expected, and to be on hand ready to take it away when received. It is assumed to be simply a question of reasonable diligence with the consignee whether he ascertains the receipt of his consignment or not; the regularity of the trains being such as to leave him without reasonable excuse, if he fails to inform himself.

There may be railroad lines in the country where the application of this rule would do injustice to no one. If the business is not so great but that freight trains can be run with the same regularity as those for passengers, and the freight can always be sent forward immediately on being received for the purpose, a notice from the consignor will usually apprise the consignee with sufficient certainty when the goods may be expected. But on the long through lines such regularity is quite impracticable. Freight must be sent forward from the carrier's warehouse with a promptness depending upon the pressure of business; or in other words, as it may suit his convenience and his interest to forward it. This may be many days, or even weeks, after its receipt, or it may be immediately. It is not always in the power of the carrier to give reliable information upon the subject, and unavoidable delays will frequently intervene after the transit has commenced. To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at important points.

The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and

which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is an almost universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who therefore never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare *Scholes v. Ackerland*, 13 Ill. 650, and *Crawford v. Clark*, 15 Id. 561, with *Richards v. Michigan etc. R. R. Co.*, 20 Id. 404, and *Porter v. Michigan etc. R. R. Co.*, 20 Id. 407. See also *Chicago etc. R. R. Co. v. Warren*, 16 Id. 502 [63 Am. Dec. 317], where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside.

But it may well be doubted whether the distinction rests upon sufficient reasons. The man who sends his goods by railroad, and who desires to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier. If any other relation than that is formed between them, it is one that the law forms upon considerations springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the incidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he de-

sires is, not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can claim any exemption from their liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and to facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures.

If the road has no warehouse, the cars must remain standing on the tract until the owner can come and receive his goods, or if they are unloaded, the company must not only establish a watch to prevent thefts, but at their peril must protect against injuries by the elements. Landing the goods on the platform, it is agreed on all hands, does not alone discharge the carrier. And it seems to me that a consideration of the immense carrying trade of the country will force one to the conclusion that it cannot possibly be either properly, expeditiously, or profitably done except with the conveniences afforded by the railroad warehouses, which afford the easiest, cheapest, and most effective means by which carriers are enabled to protect themselves against losses in that capacity.

At the great centers of commerce it would be impossible to transact the amount of business now done if the cars must stand upon the tract until the goods carried can be delivered from thence to the consignees. Unloading them in immense quantities upon open platforms would expose them to destruction. At the less important points the same thing is true, but in less degree. It would seem, therefore, looking only to the interest of the carriers, that the reasons which require the construction of warehouses are imperative. Only by means of them can they keep their tracks clear for trains, or protect against the destruction of goods of which they are insurers. And wherever the business is large, warehouses are required also, to enable the companies to carry out a system of separation and classification of goods received, without which it would be quite impossible to conduct the business with facility or profit. The warehouses are absolutely essential in connection with the receipt and dispatch of goods to be sent from each point, and in respect to which the railroad company are unquestionably liable as carriers from the time of their receipt.

In every view, therefore, they seem indispensable to the business of the carrier; and being constructed with reference to it, they are properly nothing more than an extension of the platforms upon which the companies receive and deliver goods, with walls and roofs added to facilitate, guard, and to protect against injuries by the elements.

The interest, on the other hand, which the consignee has in the warehouse, is much less direct and important. It may facilitate the delivery of goods, but the carrier is liable if he fail to deliver in reasonable time. The risk of loss and injury will be less, but against these the carrier insures. In no proper sense can the warehouse be said to be for his accommodation; and if the obligations of the carrier to him are to be diminished by its erection, he might well prefer that it should not be built. The rule which changes the carrier into a warehouseman against the will of the owner of the property, on the ground solely that he had erected convenient structures for the storage, but which structures are absolutely essential to his business as carrier, seems to me to be a departure from the rule of the common law upon reasons which do not warrant it. It is a rule which allows the insurer to absolve himself from obligations to the insured, by supplying him with conveniences for the transaction of his business, and with the means of protection against loss or damage.

A critical examination of the cases on this subject would scarcely be useful. As they cannot be reconciled, the court must follow its own reasons. I am unable to discover any ground which to me is satisfactory on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If by understanding with the consignee the goods were to remain in store for a definite period, or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such understanding, sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties, and burdensome to neither, and it will

tend to promptness on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them.

Whether the clause in the general railroad law forbidding companies formed under it from lessening or abridging their common-law liability as carriers prevents their entering into contracts by which their employers release them from any of their liability, is not clear upon the terms of the clause itself. Such contracts are not expressly forbidden, and the general tendency of legislation in modern times has been to relax, rather than to render more severe, the strict rules of the common law in regard to carriers, of which our own state presents an example in the legislative exemption of the principal companies from liability as carriers for goods in their warehouses awaiting delivery. And a clause which should forbid parties from entering into any such agreements with carriers as they might conceive to be for their interest would hardly be looked for in the general law, unless strong reasons were known to have existed for its adoption.

When that law was passed, a controversy had been going on between common carriers and the public in respect to the notices given by the former by public advertisement and otherwise, by which they sought to relieve themselves from some portion of their common-law liability, whether those employing them assented or not. The courts in this country had generally held these notices ineffectual; but they still continued to be given, and to be insisted upon as possessing legal force. I do not perceive in the clause in question any intention to go further than to put an end by the fundamental law of these organizations to any further controversy upon that ground. In view of the extent to which the courts had gone in England in giving force to such notices, no one can say that the precaution was needless. The companies are forbidden to lessen or in any way abridge their liabilities as common carriers, but the person sending goods by them is not forbidden to release them from such liabilities, or from any portion thereof, for any consideration which to him is satisfactory. In other words, the law compels these companies at all times, at the option of those sending goods by them, to carry the goods as insurers. If, on the other hand, the carriers can make it for the interest of the party to relieve them from this liability wholly or in part, a contract to that effect, if fairly made, and embracing no unreasonable conditions, is not

opposed to public policy, and to forbid it would seem an unnecessary restraint upon freedom of action: See *Bissell v. New York Cent. R. R. Co.*, 25 N. Y. 448 [82 Am. Dec. 369]. The distinction between a restriction by the carrier himself and a contract by which another party releases him from obligations was pointed out by this court in *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243, and is the same which is applicable here. Many things are transported by railroad in respect to which it may be for the mutual interest of both parties that special contracts be made. Live-stock are usually accompanied and cared for by the owner or his agent under special agreements, and in some other cases the owner prefers to assume such general oversight and control as is inconsistent with the full common-law liability of the carrier. It has not been generally supposed that the clause under consideration forbade special contracts in such cases, and the legislature of 1867 must have considered them lawful when they provided that all contracts modifying the common-law liability of railroad companies as carriers should be wholly in writing: Laws 1867, p. 165. This enactment was evidently designed, not to enlarge the powers of railroad companies, but to impose restraints upon an existing authority to make contracts.

A much more difficult question is, what shall constitute the proof of a contract, in the absence of distinct evidence that the parties have consulted and agreed upon terms. The practical difficulty, amounting almost to an impossibility, of bringing the carrier and his employer together on every occasion for the discussion of terms, has led to the adoption by carriers of a printed form of contract, which is put into the hands of the consignor, and by its terms purports to bind him to its conditions; but it is strongly insisted that there ought to be more satisfactory evidence of assent on the part of the consignor to modify any of his common-law rights than is derived from the mere receipt of a paper from the carrier, framed to suit the interest of the latter, and which the consignor may never have read.

There are some matters in respect to which the carrier may qualify his liability by mere notice. Mr. Greenleaf says: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of

freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly": 2 Greenl. Ev., sec. 235; see *Western Transportation Co. v. Newhall*, 21 Ill. 466 [76 Am. Dec. 760]. These are but the reasonable regulations which every man should be allowed to establish for his business, to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier may determine the manner in which he is authorized to make delivery: *Farmers' and Mechanics' Bank v. Champlain Trans. Co.*, 16 Vt. 52 [42 Am. Dec. 491]; S. C., 18 Vt. 131; 23 Id. 186 [56 Am. Dec. 68]. But beyond the establishment of such rules, the force of a mere notice cannot extend. Subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability. "A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment": Pierce on Railroads, 416; see *Hollister v. Nowlen*, 19 Wend. 234 [32 Am. Dec. 455]; *Cole v. Goodwin*, 19 Id. 251 [32 Am. Dec. 470]; *Jones v. Voorhees*, 10 Ohio, 145; *Bennett v. Dutton*, 10 N. H. 487; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 382; *Moses v. Boston etc. R. R. Co.*, 24 N. H. 71 [55 Am. Dec. 222]; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 256 [62 Am. Dec. 576]; *Slocum v. Fairchild*, 7 Hill, 292; *Dorr v. New Jersey Steam Navigation Co.*, 4 Sand. 136; S. C., 11 N. Y. 485; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243. The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists: *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 382, per Nelson, J.

The evidence of such a contract in the present case consists: 1. Of the defendant's mode of doing business; and 2. Of what are called in the case bills of lading, and which contain the

the supposed limitations. It is admitted by the plaintiffs that the bills of lading in use by these defendants, and all the contracts of affreightment, the instructions to agents, and the printed rules posted in all the depots and station-houses of defendants for the past ten years, have contained clauses exempting them from liability or loss by fire, and providing that when goods are in the depot awaiting delivery to consignees the company will be liable as warehousemen only, and not as carriers; and that plaintiffs have been accustomed to do business with defendants, and to receive and send goods over their road under bills of lading of this description.

There are several reasons why knowledge in plaintiffs of defendants' usage to make restrictive contracts cannot control the present case. In the first place, knowledge of such usage can in no case of the kind be allowed force beyond that which could be given to notice of an intention on the part of the carrier to restrict his liability, brought home to the party in any other mode; and we have already seen that the force of such notices is exceedingly circumscribed. And it can hardly be seriously claimed that the plaintiffs, by accepting restrictive contracts in some cases, have thereby debarred themselves from insisting upon their common-law rights thereafter. In the second place, the defendants have no power under the law to establish a usage restricting their liability, as that would come directly in conflict with the clause in the general railroad law heretofore quoted. And in the third place, if this were otherwise, the usage would be irrelevant to the present case, since the proof relates to dealings between the parties to this suit at Detroit, and to usages understood by the plaintiffs there, while the contracts here in question were in each instance made with consignors at a distance, and in most cases by other railroad companies, whose usages do not seem to be uniform.

It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part of the contract for transportation, and to be regarded as assented to by the consignors, notwithstanding they may not have read them.

A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper to be conveyed on the terms therein expressed to their destination and there delivered to the parties therein designated: Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transporta-

tion; and is the measure of their rights and liabilities, unless where fraud or mistake can be shown: Redfield on Railways, 307-309, and notes; Angell on Carriers, sec. 223. It has acquired from usage a negotiable character, and the carrier may be estopped as against the indorsee for value from showing mistakes in giving it: Redfield on Railways, 307. Whether the contracts which railroad companies are accustomed to give on the receipt of goods for transportation, and which are usually called by the same name, are subject to all the same incidents as the bills of lading proper, we need not now consider; but it will not be disputed that they fix the rights and liabilities of the parties when their terms have been agreed upon, and it is, I think, the weight of authority, and certainly the rule in this state, that the carrier may stipulate in them for a limitation of his common-law liability: *Michigan Central R. R. Co. v. Hale*, 6 Mich. 243.

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, the question of assent might fairly be considered an open one: *Brown v. Eastern R. R. Co.*, 11 Cush. 97; and if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else, — as, for instance, a mere receipt for money, — it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him as such: *King v. Woodbridge*, 34 Vt. 565. But except in these and similar cases, it cannot become a material question whether the consignor read the bill of lading or not. The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them or inquiring into their terms, — taking whatever the railroad companies see fit to give them; and that they are thus liable to be imposed upon and defrauded, unless the courts interfere to protect them. Or, if we may be allowed to state the same thing in different words, as everybody is negli-

gent in these matters, and will not give the necessary attention to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extraneous evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to exercise it, it may be important to consider, at the outset, whither it will lead us. Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are every day given and received without being read by the parties, though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are still more often received without examination. In the absence of fraud, accident, or mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties *compotes mentes* in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common-law liability. But the common law does not establish the rates of freight, or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freights in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract.

I do not find any case in which a court has assumed to set aside such a contract on the ground that the party had failed to read it. An exemption from liability from losses arising from specified causes, when embodied in the bill of lading,

has been frequently recognized as a part of the contract, though it did not distinctly appear to have been brought to the consignor's notice: *Davidson v. Graham*, 2 Ohio St. 131; *Parsons v. Monteath*, 13 Barb. 353; *York Co. v. Central R. R. Co.*, 3 Wall. 107; *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 491; and in the case last referred to, it is said that the exemption, when embodied in the bill of lading, must be deemed to have been assented to by the parties. The same presumption would seem to have been acted upon in *Moore v. Evans*, 14 Barb. 524, *Kallman v. United States Express Co.*, 3 Kan. 205, and *Whitesides v. Thurlkill*, 20 Miss. 599 [51 Am. Dec. 128]; and it is in accordance with the general rule applicable to written contracts.

It is said, however, that these special contracts must be held void for want of consideration unless it is shown that, in return for the release of the carrier from his extraordinary liability, he on his part has made a deduction in the rates of freight. What does appear in the present case is, that the carrier, in consideration of the promise by the consignor to release him from certain liabilities, and to pay him certain moneys, agrees on his part to carry the goods for the sum named. I do not see how we can assume that the charges are the same that they would have been had the release been omitted. If by the charter of a railroad corporation maximum rates had been established, and the corporation had attempted to charge these rates for a restricted liability, a case would be presented coming within the principle of this objection: *Bissell v. New York Central R. R. Co.*, 25 N. Y. 449 [82 Am. Dec. 369], *per Selden, J.*; but no such case is before us here, and a consideration appears which, for aught that is shown by the record, is sufficient.

It was also said on the argument that a rule such as we have now laid down would place the public at the mercy of the railroad companies, who would refuse to give any other than restricted bills of lading. It is enough for us to say in this case that railroad companies chartered as common carriers have no such power, and the consignor can assent to the restriction in each instance, or refuse to assent, at his option. If the corporations decline to transport goods as common carriers when that is the condition upon which they hold their franchises, there would be no difficulty, I apprehend, in applying the proper remedy.

It will now be necessary to examine the various bills of lad-

ing in reference to the particular limitations which they contain. Two of those given by the Cincinnati, Hamilton, and Dayton Railroad Company contain no restrictions; the other excepts against liability for "unavoidable accidents and fire in depot." Those issued by the defendants contain, among others, a similar exception. It is claimed by the plaintiffs that these and similar exceptions will not shield the defendants, because the loss in the present case was the result of the negligence of their officers or servants, against liability for which it was not lawful for them to contract.

Whether the rule that a carrier, on grounds of public policy, is not to be permitted to contract for exemption from liability for his own negligence (*Fairchild v. Slocum*, 19 Wend. 329; *York Company v. Central R. R. Co.*, 3 Wall. 113; 3 Parsons on Contracts, 5th ed., 249), can properly be so extended as to prevent corporations contracting against liability for the negligence of their officers or servants, or any classes of them, and if not, then whether the general words of exemption here employed ought to be construed to embrace the negligence of such officers and servants (*Wells v. New Jersey Steam Navigation Co.*, 8 N. Y. 379; *Schieffelin v. Harvey*, 6 Johns. 179 [5 Am. Dec. 206]; *Alexander v. Greene*, 7 Hill, 533), are questions I do not care to discuss in this case, inasmuch as I think no such negligence is shown.

What was relied upon was the fact that barrels of benzine were carried over the road of defendants, landed in their depot at Detroit, and then passed over to the Detroit and Milwaukee Railroad Company, which occupied the other end of the same warehouse; that some of these barrels were in a leaky condition; and that while being handled by the employees of the latter company the escaping gas took fire from a lantern, and resulted in the destruction of the warehouse and its contents. From this it appears that the fire took place after the inflammable fluid had passed out of the hands of the defendants. The fact that they had carried it over their road had nothing to do with its ignition. If it should be conceded to be negligence in the company to receive so dangerous an article among their freights, yet if no loss resulted while it remained in their custody, it would be difficult to hold them responsible for accidents happening from its subsequent handling. When the Detroit and Milwaukee company received it upon their premises, it was of no consequence from whence it came, and any accident which might result would have no relation to the

source from which it was received. It would be as legitimate to hold a merchant responsible from whom it might have been bought as the carrier from whom it had been accepted. If we are to trace causes back, we need not stop at the preceding carrier, but, with similar reason, might hold the man liable who made the leaky barrels, or the person from whom the first carrier received them filled. The law can only look at the proximate causes of an injury, and not at those remote circumstances that may have contributed to those causes: *Olmsted v. Brown*, 12 Barb. 657; *Butler v. Kent*, 19 Johns. 223; *Whately v. Murrell*, 1 Strob. 389; *Matthews v. Pass*, 19 Ga. 141; *Platt v. Potts*, 13 Ired. 455.

Some question was made on the argument whether the consignors can be held, in the absence of explicit evidence on the subject, to have authority to enter into special contracts with the carrier which shall be binding on the consignee. His authority, I think, is to be presumed; and the carrier is under no obligation to inquire into it: *Moriarty v. Harnden*, 1 Daly, 227. It is a question of more difficulty whether the Ohio bills of lading would govern the transportation for the whole route. By their terms the Cincinnati, Hamilton, and Dayton Railroad Company acknowledged the receipt of the goods in good order, to be delivered in like good order "at Toledo for Detroit," unto the plaintiffs or their assigns, they paying freight. No evidence is given of any custom that these contracts shall govern the whole distance; nor does the case show whether the rates of freight specified are for the delivery at Toledo or at Detroit. The words employed only import that the goods are to be carried to Toledo, and from thence forwarded; and in the absence of any special custom on the subject, it would seem that the company giving these bills fully discharged their duty when they had delivered the goods to the defendants at Toledo.

There is a number of English cases in which it has been held, where carriers received goods and gave receipt therefor, which specified that they were received to be sent to a point beyond their line, and there delivered to the consignee, that the contract was one for transportation the whole distance, upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands: *Muschamp v. Lancaster R. R. Co.*, 8 Mees. & W. 421; *Collins v. Bristol etc. R. R. Co.*, 11 Ex. 790; S. C. in house of lords, 5 Hurl. & N. 969. The same ruling has been made in this country, where

the carrier had expressly agreed to carry to a point beyond his line, for a compensation specified: *Wilcox v. Parmelee*, 3 Sand. 610; *Mallory v. Burrett*, 1 E. D. Smith, 234; *Noyes v. Rutland etc. R. R. Co.*, 27 Vt. 110. But the doctrine generally accepted by the American courts is, that where a carrier receives goods marked for a particular designation beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line and forward from its terminus: *Ackley v. Kellogg*, 8 Cow. 223; *Van Santvoord v. St. John*, 6 Hill, 157; *Hood v. New York etc. R. R. Co.*, 22 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 Id. 457 [63 Am. Dec. 143]; *Farmers' and M. Bank v. Champlain Trans. Co.*, 23 Vt. 209 [56 Am. Dec. 68]; *Brintnall v. Saratoga R. R. Co.*, 32 Vt. 665; *Nutting v. Connecticut River R. R. Co.*, 1 Gray, 502; *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246; *Perkins v. Portland etc. R. R. Co.*, 47 Me. 573 [74 Am. Dec. 507]; American note to 11 Exch. 797. And see *Angle v. Mississippi etc. R. R. Co.*, 9 Iowa, 487.

In the case in 1 Gray the defendants receipted the goods at a station on their line "for transportation to New York,"—a point beyond their line. No connection in business was shown between them and any other railroad company. The defendants were accustomed to receive pay only over their own road. The goods in question were delivered to a connecting line, but only a portion of them reached New York. The defendants were held not liable, on the ground that their undertaking was to carry over their own road only. Whether the receipt of freight by them for the whole distance would have affected their liability may perhaps be an open question on the authorities. That circumstance has evidently been regarded as important in some cases: See *Weed v. Saratoga etc. R. R. Co.*, 19 Wend. 537, and Redfield on Railways, 286, and note; but in *Hood v. New York etc. R. R. Co.*, 22 Conn. 1, the first carriers, who received payment for transportation over the connecting line, were regarded as having received it as agent only, and not as compensation for an undertaking by themselves to transport over such line.

In the present case, it is not shown that any connection in business exists between the defendants and the Cincinnati, Hamilton, and Dayton Railroad Company. It is admitted that the latter company "is one of those forming a transportation route from Cincinnati to the city of Detroit"; but this would be true whether the companies had business connec-

tions or not. It does not appear that the freight was paid, and the contrary is inferable. It does not even appear that the charges agreed upon were for the whole route; and if they were, the case I think would not be affected by that circumstance. The only consequence would be to make the whole freight payable to the defendants, who would deduct their own charges, and pay over to the Ohio company what remained. Fixing upon the price would only amount to an agreement by the Ohio company that the whole charges should not exceed that sum. In the absence of agreement between the two companies on the subject, the defendants would not be compelled to conform their own rates to those agreed upon at Cincinnati.

On this record as it stands, I think we must hold that the bills of lading given at Cincinnati were fully complied with when the Cincinnati, Hamilton, and Dayton company had carried the goods to Toledo, and there delivered them to the defendants. If there is any exception to this statement, it must relate to the rates of freight; but even as to those, the undertaking of the Ohio company would not bind the defendants unless authority to bind them was shown. As there is no evidence on that point, I think the defendants received the goods at Toledo to be carried to Detroit under their liability as carriers at the common law, and with the right to make such reasonable charges as their regulations may have prescribed. If reasonable charges over their own line would exceed the amount specified,—and which would appear by the way-bill,—they might refuse to receive the goods except upon prepayment; but if they received and carried them with a notification that certain rates only were to be charged for the whole transportation, they would doubtless be limited in their collection to that sum. But one company cannot possess power, arbitrarily and in the absence of consent, to fix the rates for transportation by another, on the ground solely that the two form a continuous line between two points. It must be equally without power to make contracts diminishing the common-law liability of the other; inasmuch as all such contracts must be based upon a consideration, which only the party himself or his agent duly authorized is competent to agree upon. If the bills of lading in terms applied to the carriage for the whole distance, we should be required to hold, I think, that the defendants adopted their terms and consented to be bound by them when they received and carried the goods.

under them; but I have already said that such is not the case in respect to the particular bills now under consideration.

I think, therefore, that the defendants should be held liable for the wine, candles, and tobacco shipped from Cincinnati, unless the plaintiffs had been duly notified of their receipt at Detroit, and had had reasonable time after notice to remove them before the fire had occurred. It is admitted that no notice was given of the receipt of the wine and candles, but of the arrival of the tobacco the plaintiffs were notified about half-past three o'clock in the afternoon of the 26th of April. The defendants were in the habit of closing their depot at six, P. M. The fire occurred on the same evening. I am of opinion that a reasonable time was not afforded for the removal after the notice. It might not be proper to attempt to lay down any general rule as to what shall constitute reasonable notice in these cases, where the record discloses so little which bears upon the point; but it seems quite clear to my mind that two hours and a half are not sufficient, especially in view of the notice which defendants give to consignees,—that they will charge for storage after twenty-four hours,—which may possibly have led to a general impression that the relation of warehousemen was not to be considered as established until the expiration of that time. I think, therefore, the plaintiffs should have judgment for the value of the tobacco also. For the eggs delivered to the defendants at Adrian and Hudson, under an exemption from liability for losses in consequence of fire in the depot, the defendants cannot be held liable under the principles hereinbefore stated.

CHRISTIANCY, J., concurred.

MR. JUSTICE CAMPBELL filed a very able dissenting opinion, which was concurred in by Chief Justice Martin. He agreed with Justice Cooley that the liability of defendants with regard to their leased line was to be governed by the provisions of the general railroad law. "Where a road is held under lease, I think," he remarks, "that the lessee must find his powers and responsibilities in the law which governs the leasehold property, and not in his personal or corporate capacity independent of that law." He then enters upon the discussion of the question of when the liability of a carrier as such ends, and his liability as a warehouseman commences. "The authorities upon this subject," he says, "are not in harmony. In those cases where the precise point has arisen, we find that in Indiana, Illinois, Iowa, Massachusetts, and Pennsylvania, the decisions are direct that the liability of carrier ends and that of warehouseman begins as soon as the property is placed in the warehouse. In New Hampshire and Wisconsin it is held that the special liability of a carrier continues until notice, and until time has been given for removal

Beyond this, the doctrine either way rests upon *dicta*, or upon analogies which are drawn from other kinds of carriage. Having no direct adjudications of our own, we are compelled either to rest upon the weight of these authorities or to investigate their respective merits. The text-writers cannot very safely be cited as authority upon such a dispute where the law is so recent; and if they could be, it cannot be denied that they are very far from speaking decisively. I think the preponderance of direct authority is very clearly in favor of the defendants. I am not inclined to regard this ruling as so absolutely settled as to preclude further inquiry. But I think the predominating rule is most in harmony with the course of business, and with the reasons which underlie the whole law of bailments." Mr. Justice Campbell then enters upon a discussion of the liabilities of carriers at common law; remarks that in his judgment these liabilities now rest more upon law than upon reason; that while these liabilities must be enforced in a proper case, yet this question may be taken into consideration when the common-law liabilities of such carriers are sought to be extended to new cases. He says that delivery has sometimes been loosely said to be one of the incidents of the contract of carriage, but that delivery to a man's door would be impossible to railroad companies, and that this fact must be assumed to have been taken into consideration by persons dealing with such carriers. After remarking that it must be considered as universally known that railroads cannot deliver freight unless by making arrangements distinct from the regular conveniences of their cars and track, he continues: "Our statutes require us to take notice that these corporations are expected to have warehouses and depots, and they are authorized to use the right of eminent domain to secure them. We are bound to know that goods must be placed in these warehouses in order to enable the roads to do business at all with security to their customers. If they have no such depositories of their own, they must place their goods in the warehouses of some one else, as is very generally done on state railroads. Upon the facts found in the cases before us, it appears that defendants have warehouses of their own, and that all parties are expected to call at these places for their goods, and that plaintiffs have been in the habit of doing so. The simple question is, whether these parties who are lawfully expected to have warehouses as well as cars, and who, it is admitted on all hands, may be warehousemen as well as carriers, become such as to all warehoused goods awaiting delivery, or only as to a part.

"The ground on which it is claimed that their liability as carriers continues after warehousing is, that until notice has been given of the arrival of the goods, and until sufficient time has elapsed for removing them, the carrier's duty is not performed.

"It is somewhat difficult to determine the source of this proposition, although it has often been laid down. It is usually said to be a substitute for delivery. But I think the authorities to which allusion has already been made are correct in holding that this idea is fallacious. Delivery is something to be done to the property itself, and concerns it as much as any other part of the carriage. It is, in other words, the deposit of the property at its place of destination, and is therefore attended until complete with the same risks attached to its transit. Where delivery at one place—as at the premises of the owner—is impossible, then the natural substitute would be its deposit in some other safe place which is accessible; and this would, upon all principles of analogy, complete the functions of the carrier as such. And if notice is required, it would therefore be more consistent to treat it, not as a part of the unfinished duty of the carrier, but as informing the parties concerned

that he had done his part, and they must look after their own property. And if this is so, then all the carrier can be expected to do will be to deposit his load in a proper, safe, and commodious place, such as persons generally are willing to leave their property in for safe-keeping. That notice, although proper and customary, cannot be regarded as essentially incident to the continuing and extraordinary risks of the carrier is, I think, a fair deduction from many considerations to be drawn from authority. In the first place, I think this a necessary conclusion from our own decision in *Michigan Central R. R. Co. v. Hale*, 6 Mich. 243. It was held in that case that goods in warehouse must be regarded as waiting delivery before as fully as after notice, and that notice was not necessary to change the carrier into a warehouseman, although it was necessary, under the charter of the company, to justify any charges for storage. In the next place, there are numberless cases where notice is impossible or inconvenient, and where no authority requires it. And it need hardly be remarked that the law which holds carriers to so strict an account in other things would never discharge them on mere grounds of convenience from the performance of any legal duty. I have met with no case which requires a carrier to give notice to any person not residing at the place of destination, or to any one not already known there, or to use any special diligence in hunting up consignees who are not found on ordinary inquiry. Where goods are deposited by carriers in their own warehouses, to be called for by consignees residing elsewhere, or to be forwarded, the prevailing doctrine requires no notice. Neither is it customary or required that carriers, either by land or water, who pass through different points on regular journeys, delay their business to give notice of the deposit of their way-freight. And it is universally admitted that a custom to give or to abstain from giving notice is valid, and needs no such assent as is required from those whom it is sought to affect by departures from the strict liabilities of common carriers. This of itself is enough to show that it is no necessary incident of the contract of carriage, with or without delivery, for no usage of a company can by its own force limit these liabilities. Some of the authorities dwell considerably upon the point that persons may be very willing to employ these carriers as such, and yet not be willing to accept their modified liability in another capacity. But this is assuming the whole matter; for if the railroad occupies both grounds in performing its duties, then it cannot be said that it is not employed in contemplation of the change at the termination of the transit. The one duty must be presumed to be as much contemplated as the other.

“And it is certainly more in harmony with reason to measure their responsibility in all cases by the functions performed for the time being, than to import into one business the obligations of another. If by law and usage they deal with goods when unloaded just as warehousemen deal, and are placed under the same circumstances, there is no sound reason why they should stand on any different footing. If warehousemen are less strictly bound than carriers, it is because the law has determined that when property is in their custody it does not require any further measure of protection than that which has been settled upon by legal usage from the beginning; and there is no good reason for drawing lines between persons performing identical functions. It must not be imagined that by ceasing to remain liable as carriers they cease to perform valuable services, or to care for the property. The warehouse business is one which deals with very nearly, if not quite, as much property as is handled by carriers. It requires the employment of honest agents and vigilant watchmen. The amount of care exercised in fact is fully as great as men exercise over their own possessions;

and much of our most valuable commodities will be always found stored in these repositories, because they are deemed especially safe. Carriers are allowed by contract to obtain the same immunities, and no one has ever regarded such contracts as unreasonable. And I can conceive of no rule more simple or more just than one which, in conformity with the general law of bailments, will hold railroads to be carriers when acting in the conveyance of goods, and warehousemen when holding them in store." He continues by saying that "a rule which will produce uniformity, and cannot under these circumstances be regarded as against public policy, ought to prevail. It is at once simple, certain, and intelligible; while the other rule is not uniform in its application, and is open to endless difficulties concerning reasonableness of time as well as ability to give notice, and does not, in my judgment, conform to the analogies of business." He concludes by some general remarks upon other features of the case.

CARRIER, WHEN BECOMES WAREHOUSEMAN. — After the transportation of goods has been completed, the carrier must hold them in some convenient place for a reasonable time, awaiting the arrival of the owner, and if he fails to exercise due diligence in calling for the goods, the carrier may place them in his baggage-room to keep for him, and his liability from thenceforth will be only that of a warehouseman: *Ouimit v. Henshaw*, 84 Am. Dec. 646; *Roth v. Buffalo & S. L. R. R. Co.*, 90 Id. 736. Liability of railroad company as common carriers continues not only until the goods are deposited in the depot or warehouse of the company at the place of destination, but until a reasonable opportunity has been afforded the owner or consignee to take them away: *Wood v. Crocker*, 86 Id. 773. In the notes to these cases the previous cases upon this subject will be found collected, some of which hold different doctrines. The principal case is cited, and this question discussed, in *Derosia v. Winona etc. R. R. Co.*, 18 Minn. 133, and *Parker v. Milwaukee and St. Paul R. R. Co.*, 30 Wis. 689. The court divided as in the principal case in *Buckley v. Great Western R'y*, 18 Mich. 121-133.

COMMON CARRIER LIMITING LIABILITY. — Common carrier may specially contract with employer for partial or total exemption from his common-law liability, as an insurer of property committed to his custody; and a notice by the carrier to this effect, if brought home to the owner of the property delivered for transportation, and assented to clearly and unequivocally by him, will be binding and obligatory upon him. The carrier cannot by mere general notice exonerate himself from his legal liability for property delivered to him for carriage, nor limit such liability absolutely to a certain amount beyond which he will not be held responsible in case of injury or loss: *Judson v. Western R. R. Co.*, 83 Am. Dec. 646; *Southern Express Co. v. Newby*, 91 Am. Dec. 783. He may limit his liability by contract founded on a valuable consideration, such as abatement in whole or part of the legal fare; and such contracts are not contrary to public policy: *Bissell v. New York Cent. R. R. Co.*, 82 Id. 369. He may limit his responsibility by a general notice that the baggage of a passenger is at the risk of the owner, provided the terms of the notice are clear and explicit, and are brought home to the employer: *Pennsylvania R. R. Co. v. Schwarzenberger*, 84 Id. 490. Carrier can limit his common-law liability almost without limit, provided the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and agreement of the parties: *Baltimore and Ohio R. R. Co. v. Rathbone*, 88 Id. 664; *Illinois Cent. R. R. Co. v. Smyser*, 87 Id. 301; but the contract must be fairly made, clearly proved, and fully understood by the

other party: *Adams Express Co. v. Nock*, 87 Id. 510. In the notes to these cases the previous cases in this series will be found collected.

CUSTOM LIMITING LIABILITY OF COMMON CARRIER CANNOT BE SHOWN: *Boon v. Steamboat Belfast*, 88 Am. Dec. 761, and note; *Illinois Cent. R. R. Co. v. Smyser*, 87 Id. 301.

BILLS OF LADING CONSTITUTE SPECIAL CONTRACTS BETWEEN CARRIERS AND THEIR EMPLOYERS: *Baltimore and Ohio R. R. Co. v. Rathbone*, 88 Am. Dec. 665, and note.

CARRIERS ARE BOUND TO CARRY ARTICLES WITHIN SCOPE OF THEIR BUSINESS, without any other contract than such as the law would imply: *Adams Express Co. v. Nock*, 87 Am. Dec. 510.

CARRIER'S LIABILITY FOR GOODS TO BE TRANSPORTED BEYOND HIS LINE: See *Briggs v. Boston & L. R. R. Co.*, 83 Am. Dec. 626; *Najac v. Boston & L. R. R. Co.*, 83 Id. 686; *Pennsylvania R. R. Co. v. Schwarzenberger*, 84 Id. 490, and notes. The principal case is cited to the point that after the first carrier has finished his transportation and holds the goods, waiting to forward them on the lines of a connecting carrier, he holds them subject to his liability as a carrier: *Hooper v. Chicago & N. W. R. R. Co.*, 27 Wis. 81. The subject of the respective rights of connecting carriers is discussed in *Schneider v. Evans*, 25 Id. 261, where the principal case is cited.

DUNLAP v. GLEASON.

[16 MICHIGAN, 153.]

NOT SALE—TITLE REMAINS IN BAILOR.—Where the owner of personal property delivers it to another under an agreement that the latter is to keep and carefully use it, and not remove it from the county, and that he is to return it at the end of three months, provided that if he pays the first party an agreed price therefor within that time, he may become the owner of the property, this is not a sale, but a bailment, the title remaining in the first party; and he may maintain replevin to recover his property.

BAILMENT—REFLEVIN.—Where one to whom property has been bailed for a specified time violates his trust and transfers the property to another, the owner may maintain replevin against the latter, although the term of the bailment has not expired.

GLEASON was the owner of a sewing-machine, which he delivered to Pollock and wife, and took therefor a receipt, the terms of which appear from the opinion. After this, Pollock sold the machine to plaintiff in error, whereupon Gleason replevied it.

Kirchner and Elliott, for the plaintiff in error.

Ward and Palmer, for the defendant in error.

By Court, COOLEY, J. In the writing given by Pollock to Gleason, the former acknowledged the receipt of the sewing-machine, which he agreed to safely keep and carefully use, and not remove from Wayne County, and at the expiration of three months, return the same to Gleason, free of charge and encumbrance. Thus far, there is no intimation of an intended sale, and the words employed are aptly chosen to create a bailment. But it is then added that it is understood that if Pollock, within the three months, shall pay to Gleason sixty dollars, the said writing shall be null and void, and Gleason shall execute a bill of sale of the machine. In other words, Pollock may terminate the bailment and purchase the machine by the payment of sixty dollars within the three months, at his option.

We think the terms of this paper clearly show that Gleason did not intend to trust to the personal responsibility of Pollock, or to part with his title, conditionally or otherwise, until the sixty dollars was paid. In this, the case differs from those cited on behalf of the plaintiff in error. Gleason has not taken from Pollock an alternative promise, leaving with him a choice in performance, but he has required an absolute undertaking for the return of the machine within a time limited. The further stipulation is in the nature of a defeasance of that undertaking, dependent, not upon Pollock's agreement to pay the price of the machine, but upon his actually paying it. Until such payment, the agreement to return remains in full force; and it is plain that Gleason did not intend to give credit on sale of the machine, but to sell only for cash payment.

This being so, and the title remaining in Gleason, he had a right to replevy the machine when Pollock put it out of his hands, whether the three months had expired or not. The bailment, by its express terms, imports a personal trust which could not be transferred.

Judgment affirmed, with costs.

CHRISTIANCY and CAMPBELL, JJ., concurred.

MARTIN, C. J., did not sit.

SALE AND DELIVERY OF GOODS ON CONDITION that title shall not vest in vendee until payment of price, passes no title until the condition is performed: *Burbank v. Crocker*, 66 Am. Dec. 470; *Sargent v. Metcalf*, 66 Id. 368. Deliv.

ery of articles at fixed price, under alternative agreement that the article is to be paid for or returned at the option of the party receiving it, constitutes a sale. But where the vendee admits the title to be in the vendor, and to remain there until such property is fully paid for, the transaction amounts to a conditional sale: *Crocker v. Gullifer*, 69 Id. 118. Title remains in the seller until the terms and conditions of the contract of sale are entirely settled: *Nicholson v. Taylor*, 72 Id. 728; see also note to *Thrall v. Lathrop*, 73 Id. 309; and *Bailey v. Harris*, 74 Id. 312. The principal case is cited to this point in *Sanders v. Keber*, 28 Ohio St. 630; *Smith v. Loo*, 42 Mich. 11.

REPLEVIN OR TROVER FOR BAILED PROPERTY: See *Burton v. Curryea*, 89 Am. Dec. 350, and cases in note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BERTHOLD v. HOLMAN.

[12 MINNESOTA, 335.]

WHERE ORGANIZED COUNTY IS ATTACHED TO ANOTHER COUNTY FOR JUDICIAL PURPOSES, FORECLOSURE SALE of mortgaged premises may be conducted by the sheriff of the former county, as there is nothing of a judicial nature about such a performance.

RIGHTS AND TITLE OF MORTGAGOR. — Mortgage is only security, and until foreclosure the title to the mortgaged premises remains in the mortgagor, who may sell the land, subject to the mortgage, or convert part of the realty into personalty, and dispose of that subject to the right of the mortgagee to keep his security good.

PURCHASER AT FORECLOSURE SALE ACQUIRES NO TITLE TO PINE TREES SEVERED AND CONVERTED INTO LOGS before the sale, where he bid the full amount due on the mortgage for the land, although the logs were on the premises at the time. The purchase for the full amount of the mortgage was a satisfaction of the debt, and as the mortgage was a mere security, the mortgagee could ask for nothing more.

LOGS CUT UPON MORTGAGED PREMISES WITHIN ONE YEAR AFTER FORECLOSURE by the mortgagor in possession, who has a right to redeem within that time, cannot be recovered in an action of claim and delivery or replevin by the purchaser at the foreclosure sale, and as during that time he has no possession nor right to possession of the land upon which they were cut, he could have no right to the possession of the trees severed therefrom and converted into logs.

IMPAIRING OBLIGATION OF CONTRACT. — Legislation providing that the mortgagor shall upon payment of interest retain possession of the mortgaged premises for one year after foreclosure does not impair the mortgage contract; it at most affects the remedy only.

THE opinion states the case.

Cornman and Stickney, for the appellant.

H. N. Setzer, for the respondent.

By Court, BERRY, J. In this case it appears that under a power contained in a mortgage a foreclosure sale of lands situate in Pine County was made by the sheriff of Pine County. The counsel for the respondent insists that although Pine was an organized county, yet inasmuch as it was attached to Chisago for judicial purposes, there could be no sheriff of Pine County, and no valid sale by any person pretending to be such officer, but the sale should have been made by the sheriff of Chisago County. The attachment of Pine to Chisago County is for judicial purposes. Certainly there is nothing of a judicial nature about the execution *in pais* of a power of sale contained in a mortgage. For such purposes Pine was not attached to Chisago County, and there is no reason why the sheriff of Pine County might not act in such cases. But we are not left in this matter to construction alone. Section 1, chapter 7, page 47, Laws of 1862 (Ex. Sess.), defines, among other things, the effect of such attaching to be that "every county which is attached to an organized county for judicial purposes shall, for the administration of civil and criminal justice, be taken and deemed a part of said organized county," and provides further for the execution of "all process, civil or criminal," by the sheriff of the senior county. Even if it be conceded that under this statute the sheriff of Pine County would be precluded from serving "process, civil or criminal," still there is nothing here to prevent the existence of the office of sheriff of Pine County for other purposes, or to prevent such sheriff from making a sale of this kind. We have no doubt that the sheriff of Pine County was a proper officer to conduct this sale.

The foreclosure sale came off on the twentieth day of August, 1864, and the certificate of sale was filed September 2, 1864, the plaintiff being the purchaser for the full amount then due upon the mortgage. This action was commenced July 13, 1865. Prior to the sale, and after the execution of the mortgage, Fox, one of the mortgagors, and O'Brien, his partner, without the knowledge or consent of the mortgagee or of his assignee, the plaintiff, cut a large quantity of pine logs upon the mortgaged premises, and during the summer and spring of 1865 removed a large portion of said logs. It is well settled in this state that a mortgage is a security only, and that until foreclosure the legal title to lands mortgaged remains in the mortgagor: *Adams v. Corrison*, 7 Minn. 462; *Hill v. Edwards*, 11 Id. 22. He may sell and convey the

land subject to the mortgage, and he may sell and convey anything which, though part of the realty, is capable of being made personalty by severance, subject to the right of the mortgagee to keep his security good. When the pine trees in this case were converted into logs, they became personal property, and unquestionably the mortgagee could have prevented their removal from the premises, or have followed them if removed, had it been necessary to do so in order to preserve his security: *Hutchins v. King*, 1 Wall. 53; *Hamlin v. Parsons*, 12 Minn. 59. But instead of taking any measures to this end, he purchases the mortgaged premises at the foreclosure sale for the full amount then due on the mortgage; a portion of the timber trees, which were a part of his security when the mortgage was taken, having been converted into logs before that time. The purchase for the full amount of the debt was a complete satisfaction of the mortgage. It was a purchase of the realty, not of the logs lying upon the realty. The plaintiff took the land alone in satisfaction of the mortgage. When the mortgage was satisfied, the mortgagee had nothing further to ask for. His mortgage being but a security, it was made completely effectual when the debt was paid by the purchase. The plaintiff had received all that he had any right to demand. The plaintiff has no claim to the logs cut before the foreclosure sale.

The complaint also alleges that the said Fox and O'Brien cut logs from the mortgaged premises after the foreclosure sale, to wit, in 1864 and 1865, and it is alleged that the defendant Holman, who demurs separately, and from the order sustaining whose demurrer the present appeal is taken, "claims to own and holds possession of said logs by virtue of a certain instrument executed by O'Brien and Fox, and dated October 20, 1864, and filed and recorded in said office of the surveyor-general on the thirty-first day of October, 1864, which instrument in writing purports to convey all the said logs not conveyed to Folsom to the defendant Holman, to secure the payment of certain large sums of money." The complaint further alleges in terms the wrongful detention of the logs by Holman and his co-defendants. The mortgage in this case was executed in June, 1858, at a time when, under the law then in force, the purchaser was entitled to possession immediately after a mortgage sale: Pub. Stats., p. 645, sec. 11.

By the act of July 29, 1858 (Laws of 1858, c. 61), it was

enacted that the mortgagor, or those claiming under him, should be entitled to possession until the expiration of the period of redemption upon payment of interest. This period of redemption under the act of 1858, and the law as it stood before the passage of the act, was one year. It is insisted in the case at bar that the right of the purchaser to take possession of the mortgaged premises immediately upon the sale was a part of the contract of mortgage, and that to allow the act of 1858 to operate upon the mortgage in this case would be to impair the obligation of the contract; but this has been otherwise determined in this court: See *Heyward v. Judd*, 4 Minn. 487, *per* Emmett, C. J.; *Id.* 493, *per* Atwater, J.; *Id.* 496, *per* Flandrau, J.; *Carroll v. Rossiter*, 10 *Id.* 174. We understand the doctrine of *Heyward v. Judd*, *supra*, to be that legislation like the provision of the act of 1858, above referred to, at most affects the remedy only, and not the obligation of the contract, and that it was competent for the legislature to deprive the purchaser of his right of possession immediate upon the sale, and to allow the mortgagor or his representative in interest to retain possession until the expiration of redemption: See also *Donnelly v. Simonton*, 7 Minn. 175. This present action was instituted before the period of redemption allowed by law had expired. The purchaser at the sale was not then entitled to the possession of the mortgaged premises: Laws of 1858, c. 61, sec. 2; Laws of 1860, c. 87, sec. 2; *Donnelly v. Simonton*, 7 Minn. 175; *Adams v. Corrison*, 7 *Id.* 463. The only ground upon which he could claim any right to the logs was because they were a part of the realty which he had purchased: *Adams v. Corrison*, *supra*. But as he had no possession, nor right to the possession, of the land upon which they were cut, he could have no right to the possession of the trees severed therefrom and converted into logs: *Rich v. Baker*, 3 Denio, 79.

Now, this is an action of "claim and delivery," called in common parlance "replevin," and governed in the main by the same rules as the action of replevin: *Ames v. Mississippi Boom Co.*, 8 Minn. 471. But in replevin the right of immediate possession of the property sought to be recovered was a *sine qua non*, and so it is in the action of claim and delivery: 2 Greenl. Ev., sec. 56; 1 Chit. Pl. 164; *Dodworth v. Jones*, 4 Duer, 202; *Wheeler v. Train*, 3 Pick. 257; *Rockwell v. Saunders*, 19 Barb. 481; *Lewis v. Buck*, 7 Minn. 104.

Section 131, chapter 60, page 549, Public Statutes, following

this rule in prescribing the contents of the affidavit necessary to entitle the plaintiff in an action of claim and delivery to the possession of the property in dispute, enacts that it must contain, among other things, statements to the effect "that the plaintiff is the owner of the property claimed, . . . or is lawfully entitled to the possession thereof," and "that the property is wrongfully detained by the defendant." As the plaintiff in this case was not, in his capacity as purchaser at the mortgage sale, in possession or entitled to possession of the land or the logs, he cannot maintain this action; yet the legislature did not leave him without remedy, for having deprived the purchaser of the right to take possession immediately after the sale for his own protection, section 3 of the act of 1858 enables such purchaser to secure protection by applying upon eight days' notice to the court, or a judge thereof in vacation, for an order or injunction to stay waste, etc.; nor is he deprived of whatever other remedies were in existence.

The complaint alleges that the original mortgagee was put into possession of the mortgaged premises by the mortgagors, at the time of the execution of the mortgage, with the agreement that he should hold such possession until the mortgage was satisfied. It does not appear, however, that this possession was attempted to be transferred to the plaintiff, who claims to hold by an assignment of the mortgage, nor that the plaintiff ever had possession or right of possession; and it must be admitted, as remarked by the counsel for respondent on the hearing, that the complaint does not very clearly show that the mortgage was ever assigned to the plaintiff in such way as to entitle him to pursue the remedy of foreclosure by advertisement; but we have preferred to rest our determination upon points which go to the bottom of the matter. The views which we have expressed dispose of several points made on the argument, to which we have not particularly referred. Our conclusion is, that the demurrer was well taken, and that the order sustaining it must be affirmed.

MORTGAGE OF LAND CONVEYS NO TITLE, LEGAL OR EQUITABLE, to mortgagee, but the title remains in the mortgagor until foreclosure and sale, and the mortgage is but a security in the nature of a specific lien for the debt: *Ladue v. Detroit etc. R. R. Co.*, 87 Am. Dec. 759; *Freeman v. Bass*, 89 Id. 255; *Horstman v. Gerker*, 88 Id. 501; *Dutton v. Warschauer*, 82 Id. 765; *Timms v. Shannon*, 81 Id. 632. The principal case is cited to the point that a mortgage is a security only, and that the legal title to mortgaged premises remains in the mortgagor, in *Humphrey v. Busson*, 19 Minn. 224. The principal case is

also cited in *Tinkcom v. Lewis*, 21 Id. 136, to the point that a bid for the full amount of the mortgage debt operates as a discharge of the mortgage.

WHAT PASSES BY FORECLOSURE SALE OF MORTGAGED PREMISES: *San Francisco v. Lawton*, 79 Am. Dec. 187, and note. Purchaser at foreclosure sale may maintain action on the case against the mortgagor for cutting and carrying away timber during the period of redemption: *Stout v. Keyes*, 43 Id. 465. The principal case is cited to the point that it is settled in Michigan that ordinarily the owner of a mortgage of real estate is not entitled before foreclosure to the possession of the lands mortgaged or of the timber growing or lying thereon, in *Berthold v. Fox*, 13 Minn. 506.

GRISWOLD v. STEAMBOAT OTTER.

[12 MINNESOTA, 465.]

ACTION AGAINST VESSEL IN STATE COURT. — State courts have no jurisdiction of an action against a vessel by name, as this is an exercise of admiralty jurisdiction, a jurisdiction conferred exclusively upon the United States district court.

THE opinion states the case.

Allis and Williams, for the appellant.

George L. Otis, for the respondent.

By Court, BERRY, J. The appellant brought this action in the district court for Ramsey County to recover damages for the breach of a contract of affreightment, to wit, for the non-delivery of certain goods shipped on board of the defendant at Henderson for transportation to Mankato. It is claimed that this action, based upon a contract of this character, to be performed upon the Minnesota River, and brought against the boat by name, under our statute relating to proceedings against boats and vessels, is an attempt to exercise admiralty jurisdiction, a jurisdiction conferred upon the district courts of the United States exclusively, except "on the lakes and navigable waters connecting said lakes." That the breach of a contract of affreightment to be performed upon navigable waters is an appropriate subject of admiralty jurisdiction can hardly be questioned, and that the remedy sought in this case by a proceeding against the steamboat by name is, to all intents and purposes, such a remedy as is administered by courts of admiralty, and can only be administered by the district courts of the United States (except on the lakes and connecting waters), would appear to be settled by recent

decisions of the federal supreme court in *The Moses Taylor*, 4 Wall. 427, and in *The Hine v. Trevor*, 4 Id. 555. In the latter case, upon a review of the adjudications upon this subject, Mr. Justice Miller says: "The examination of the cases already decided by this court establishes clearly the following propositions: 1. The admiralty jurisdiction to which the power of the federal judiciary is by the constitution declared to extend is not limited to tide-water, but covers the entire navigable waters of the United States; 2. The original jurisdiction in admiralty exercised by the district courts, by virtue of the act of 1789, is exclusive not only of the other federal courts, but of the state courts also; 3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24, 1789."

In both of the cases cited a construction was put upon the clause of the ninth section of the act of 1789, which "saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

In *The Moses Taylor*, *supra*, Mr. Justice Field, in delivering the opinion of the court, says: "The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is, that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. . . . By the common-law process, whether of mesne, attachment, or execution, property is reached only through a personal defendant." And again, on page 431: "It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem* as used in the admiralty courts is not a remedy afforded by the common law; it is a proceeding under the civil law." In *The Hine v. Trevor*, *supra*, Mr. Justice Miller takes substantially the same ground, and also points out the distinction between the admiralty remedy *in rem*, and a proceeding against an owner with attachment of his vessel. These doctrines manifestly apply to the case at bar, notwithstanding the facts show that the contract in this instance was made in this state, and was to be wholly performed in this state, upon a river flowing from its source to its mouth entirely within the boundaries of this state: See also *The Propeller Commerce*, 1 Black, 578; *The Flash*, 1 Abb. Adm. 67.

It follows that this action must be dismissed for want of jurisdiction. Ordered accordingly.

ACTIONS AGAINST VESSELS IN STATE COURTS. — This subject is exhaustively discussed in the note to *Keating v. Spink*, 62 Am. Dec. 234. See also *Phegley v. Steamboat David Tatum*, 84 Id. 57; *Randall v. Roche*, 82 Id. 233.

STATE v. JOHNSON.

[12 MINNESOTA, 476.]

NEGATIVE EXCEPTION. — IN INDICTMENT FOR BIGAMY under a statute making one guilty of that offense who already being married, married another person, except where one of the married persons has been absent for seven years, and the one marrying again did not know the other to be living within that time, if the indictment states that the defendant knew at the time of his second marriage and ever since that his first and lawful wife was living, this cures the omission of the indictment to negative the exception in the statute.

IF SECOND MARRIAGE CHARGED AS BIGAMOUS WAS CELEBRATED IN ANOTHER STATE the party cannot be punished for it here; but "continuing to cohabit with such second husband or wife" while the first is living, by the party marrying again, with knowledge that the first husband or wife is living, is polygamy by the law of Minnesota; and on no ground of comity or policy is a state bound to sanction incestuous or polygamous marriages, though valid in another state where they were entered into.

EVIDENCE IN PROSECUTIONS FOR BIGAMY. — On the trial of an indictment for bigamy, an actual marriage or marriage in fact must be clearly proven in both the first and second instances by direct evidence. Indirect or circumstantial evidence, as of cohabitation, repute, conduct of the parties, birth of children, and admissions, is never admissible to establish marriage, or as corroborative of direct evidence of marriage; but it would be admissible so far as it tended to show continued cohabitation under the statute.

EX POST FACTO LAW. — Law is *ex post facto* which alters the legal rules of evidence, and receives less or different testimony than the law required at the time the offense was committed, in order to convict. Consequently where a law was enacted subsequently to the finding of an indictment for bigamy, allowing the marriages to be proved by indirect and circumstantial evidence, instead of direct and positive evidence, it is as to such indictment *ex post facto*.

WITNESSES — ASKING WITNESS IF SHE HAD MADE PREVIOUS INCONSISTENT STATEMENTS. — On trial of indictment for bigamy, where second wife as witness for the state testified that she was not married to the defendant, she may be asked by the state if she had not previously made contrary statements. This is not inconsistent with the rule that a person cannot impeach his own witness.

THE opinion states the case.

Berry and Waterman, for the plaintiff in error.

William Colvill, attorney-general, for the state.

By Court, BERRY, J. At the March term, 1866, of the district court for the county of Winona, an indictment was found against the plaintiff in error, in which he is accused of the crime of polygamy, committed as follows: "That the said George Johnson, on the eighteenth day of March, A. D. 1835, at the city of Buffalo, in the state of New York, did marry and take to wife one Eleanor Cherry; that afterwards, to wit, during the year 1856, the said George Johnson, in the county of Lacrosse, state of Wisconsin, while his lawful wife, Eleanor, was still living, did unlawfully marry and take to wife Catherine Flannegan, and the said George Johnson ever since the said last-named marriage has continued to reside and cohabit with the said Catherine Flannegan in the county of Winona, state of Minnesota; that the said Eleanor Cherry, the former wife of the said George Johnson, is still living in the state of New York; and that the said George Johnson knew at the time of said second marriage, and ever since, that his first and lawful wife, the said Eleanor Cherry, was still living, and that he, the said George Johnson, had never been divorced from the said Eleanor Cherry; and that the said George Johnson has willfully, knowingly, and feloniously ever since said second marriage continued to cohabit with the said Catherine Flannegan in the county of Winona, state of Minnesota, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota." Upon this indictment the accused was tried, convicted, and sentenced, and he brings the cause into this court by writ of error.

The statute in force at the time this indictment was found, and relating to the crime of polygamy, reads as follows:—

"Sec. 2. If any person who has a former husband or wife living shall marry another person, or shall continue to cohabit with such second husband or wife, he or she shall, except in the cases mentioned in the third section, be deemed guilty of the crime of polygamy, and shall be punished," etc.

"Sec. 3. The provisions of the preceding section shall not extend to any person whose husband or wife shall have been continually remaining beyond sea, or shall have voluntarily withdrawn from the other and remained absent for the space of seven years together, the party marrying again not know-

ing the other to be living within that time; nor to any person who has been legally divorced from the bonds of matrimony, and was not the guilty cause of such divorce": Pub. Stats. 728.

It will be observed that the indictment in this case does not allege that Eleanor Cherry, the first wife of the plaintiff in error, has not been continually remaining beyond sea. His counsel contends that the exception made where the wife has "been continually remaining beyond sea" is an exception contained in the same clause (of the act) which creates the offense, and that it is therefore necessary under a rule of pleading that the indictment should show affirmatively that the exception does not exist in the case in which the indictment is found. It would seem proper to regard the exceptions as made in the same clause which creates and defines the offense of polygamy, to wit, section 2. For a more particular description of such exceptions, reference is made to section 3, immediately following.

This appears to have been the construction followed in framing indictments for polygamy under the statute of Massachusetts,—which is almost literally identical with our own,—in *Commonwealth v. Boyer*, 7 Allen, 306, and in *Commonwealth v. Johnson*, 10 Id. 196. Without questioning this rule of pleading or its applicability to this case, the attorney-general claims that the want of the allegation referred to is cured by the subsequent allegation, "that the said George Johnson knew at the time of said second marriage, and ever since, that his first and lawful wife, the said Eleanor Cherry, was still living." We think this position is sound. Under the statute to which we have referred it has been held in Massachusetts that the words "and remained absent for the space of seven years" apply "as well to the case of the wife remaining beyond sea as to the case where one party has voluntarily withdrawn from the other": *Commonwealth v. Johnson*, 10 Allen, 198; see also *Commonwealth v. Mash*, 7 Met. 472.

The same construction is to be put upon our statute, and it must follow that the other words, "the party marrying again, not knowing the other to be living within that time," apply also to both cases. In this view of the statute, the fact that the first wife had continually remained beyond sea would not bring the accused within the exception of the statute so long as he knew that his first wife was in life, and the latter fact

being alleged, it cannot be necessary to negative the former: 3 Greenl. Ev., sec. 204.

It will not, then, be our duty in this case to define the phrase "beyond sea." The authorities are not in harmony as to its meaning, some holding that it signifies "out of the state," and some "out of the United States": *Whitney v. Goddard*, 20 Pick. 307 [32 Am. Dec. 216]; *Bank of Alexandria v. Dyer*, 14 Pet. 145; *Rhodes v. Bell*, 2 How. 405; *Murray v. Baker*, 3 Wheat. 541; *Shelby v. Guy*, 11 Id. 368; Bouv. Dict., tit. Beyond Sea; 3 Parsons on Contracts, 5th ed., 98; Angell on Limitations, sec. 200.

It is further insisted by the counsel for the prisoner that the indictment is bad, because it does not allege that the second marriage was "unlawful in the state of Wisconsin where it took place." Whether it is to be presumed—as the attorney-general contends—that the law of Wisconsin is in this respect like our own (see, however, *White v. Knapp*, 47 Barb. 554), we do not deem it necessary to determine. If the second marriage was celebrated in Wisconsin, the parties cannot be punished for it in this state. If it was a crime, it was an offense against the peace and dignity of another state. But as we understand the statute, even if the second marriage was lawful where celebrated, "continuing to cohabit with such second husband or wife" while the first is living, by the party marrying again, with knowledge that the first wife is living, is polygamy by our law: *Bradley v. Boston etc. R. Co.*, 2 Cush. 544; *Regina v. Cullen*, 9 Car. & P. 681.

Neither *ex comitate*, nor on the grounds of public policy, has it been considered that a state is bound to sanction incestuous or polygamous marriages, though valid in another state where they were entered into: Bishop on Marriage and Divorce, secs. 127, 130, 149; Story on Conflict of Laws, sec. 114; 2 Greenl. Ev., sec. 460, p. 442, note 1; 2 Kent's Com. 91, note a. The objections to the indictment must therefore be overruled.

A form of indictment for bigamy is prescribed in section 67, page 759, Public Statutes. If that form be applicable and sufficient, it is manifest that the indictment in this case is good; but as our attention was not called to the statute by counsel, and no point is made upon it, and as we sustain the indictment on other grounds, we do not deem it necessary to examine the statute referred to.

In the progress of the trial, Moses Cherry was put upon the stand by the state, and testified "to having been an actual

witness to the performance of the marriage ceremony [between George Johnson, the prisoner, and Eleanor Cherry], at the house of the witness, by a Methodist minister; that they stood up together, and the minister performed the ceremony in the usual form, and pronounced them man and wife."

No objection was made to the competency of this testimony. The rule generally laid down is, that in a prosecution for polygamy a first marriage in fact must be proved, and this may be done by the testimony of an eye-witness to the marriage: 2 Greenl. Ev., sec. 461; 2 Stark. Ev. 698, 894; Bishop on Marriage and Divorce, sec. 324; *Catherwood v. Caslon*, 13 Mees. & W. 264. As a marriage in fact must be made out, the question of marriage or no marriage is to be determined by the *lex loci contractus*; it is also held necessary that it should appear that the first marriage was valid by the law of the place of its celebration: 2 Stark. Ev. 894-895, 705; 3 Greenl. Ev., sec. 204; *Lacon v. Higgins*, 3 Stark. 178; S. C., 16 Eng. Com. L. 425; *Catherwood v. Caslon*, 13 Mees. & W. 264. As to this, however, no point is made in this case. The court, against objection, received evidence of admissions of the accused as to the fact that Eleanor Cherry was his wife, also evidence of the cohabitation of the accused and Eleanor Cherry, evidence of the fact that they had three or four children, and evidence of general repute as to their relation of husband and wife.

In *State v. Armstrong*, 4 Minn. 335, in delivering the opinion of the court, Mr. Justice Flandrau says: "But in criminal prosecutions for bigamy, or in adultery, where the offense depends upon the defendant being a married man or woman, the marriage must be proved in fact, and a conviction cannot be had upon the admissions of the defendant"; and cites *People v. Humphrey*, 7 Johns. 314.

Following the rule laid down by the authorities before cited, and recognized in *State v. Armstrong*, *supra*, that a marriage in fact must be proven, and by direct evidence, the question now to be considered is, whether, in addition to this direct evidence, indirect or circumstantial evidence, as of cohabitation, repute, conduct of the parties, birth of children, and admissions, is admissible on the question of marriage in prosecutions for bigamy.

On this point most of the authorities are not explicit, although generally agreeing that such evidence is not sufficient.

this rule in prescribing the contents of the affidavit necessary to entitle the plaintiff in an action of claim and delivery to the possession of the property in dispute, enacts that it must contain, among other things, statements to the effect "that the plaintiff is the owner of the property claimed, . . . or is lawfully entitled to the possession thereof," and "that the property is wrongfully detained by the defendant." As the plaintiff in this case was not, in his capacity as purchaser at the mortgage sale, in possession or entitled to possession of the land or the logs, he cannot maintain this action; yet the legislature did not leave him without remedy, for having deprived the purchaser of the right to take possession immediately after the sale for his own protection, section 3 of the act of 1858 enables such purchaser to secure protection by applying upon eight days' notice to the court, or a judge thereof in vacation, for an order or injunction to stay waste, etc.; nor is he deprived of whatever other remedies were in existence.

The complaint alleges that the original mortgagee was put into possession of the mortgaged premises by the mortgagors, at the time of the execution of the mortgage, with the agreement that he should hold such possession until the mortgage was satisfied. It does not appear, however, that this possession was attempted to be transferred to the plaintiff, who claims to hold by an assignment of the mortgage, nor that the plaintiff ever had possession or right of possession; and it must be admitted, as remarked by the counsel for respondent on the hearing, that the complaint does not very clearly show that the mortgage was ever assigned to the plaintiff in such way as to entitle him to pursue the remedy of foreclosure by advertisement; but we have preferred to rest our determination upon points which go to the bottom of the matter. The views which we have expressed dispose of several points made on the argument, to which we have not particularly referred. Our conclusion is, that the demurrer was well taken, and that the order sustaining it must be affirmed.

MORTGAGE OF LAND CONVEYS NO TITLE, LEGAL OR EQUITABLE, to mortgagee, but the title remains in the mortgagor until foreclosure and sale, and the mortgage is but a security in the nature of a specific lien for the debt: *Ladue v. Detroit etc. R. R. Co.*, 87 Am. Dec. 759; *Freeman v. Bass*, 89 Id. 255; *Horstman v. Gerker*, 88 Id. 501; *Dutton v. Warschauer*, 82 Id. 765; *Timme v. Shannon*, 81 Id. 632. The principal case is cited to the point that a mortgage is a security only, and that the legal title to mortgaged premises remains in the mortgagor, in *Humphrey v. Busson*, 19 Minn. 224. The principal case is

also cited in *Tinkcom v. Lewis*, 21 Id. 136, to the point that a bid for the full amount of the mortgage debt operates as a discharge of the mortgage.

WHAT PASSES BY FORECLOSURE SALE OF MORTGAGED PREMISES: *San Francisco v. Lawton*, 79 Am. Dec. 187, and note. Purchaser at foreclosure sale may maintain action on the case against the mortgagor for cutting and carrying away timber during the period of redemption: *Stout v. Keyes*, 43 Id. 465. The principal case is cited to the point that it is settled in Michigan that ordinarily the owner of a mortgage of real estate is not entitled before foreclosure to the possession of the lands mortgaged or of the timber growing or lying thereon, in *Berthold v. Fox*, 13 Minn. 506.

GRISWOLD v. STEAMBOAT OTTER.

[12 MINNESOTA, 465.]

ACTION AGAINST VESSEL IN STATE COURT. — State courts have no jurisdiction of an action against a vessel by name, as this is an exercise of admiralty jurisdiction, a jurisdiction conferred exclusively upon the United States district court.

THE opinion states the case.

Allis and Williams, for the appellant.

George L. Otis, for the respondent.

By Court, **BERRY, J.** The appellant brought this action in the district court for Ramsey County to recover damages for the breach of a contract of affreightment, to wit, for the non-delivery of certain goods shipped on board of the defendant at Henderson for transportation to Mankato. It is claimed that this action, based upon a contract of this character, to be performed upon the Minnesota River, and brought against the boat by name, under our statute relating to proceedings against boats and vessels, is an attempt to exercise admiralty jurisdiction, a jurisdiction conferred upon the district courts of the United States exclusively, except "on the lakes and navigable waters connecting said lakes." That the breach of a contract of affreightment to be performed upon navigable waters is an appropriate subject of admiralty jurisdiction can hardly be questioned, and that the remedy sought in this case by a proceeding against the steamboat by name is, to all intents and purposes, such a remedy as is administered by courts of admiralty, and can only be administered by the district courts of the United States (except on the lakes and connecting waters), would appear to be settled by recent

when done, criminal, and punishes such action; . . . 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

Speaking for myself alone, I am inclined to the opinion that it would not be difficult to deduce the latter proposition from the first, or from the definitions found as above in *Fletcher v. Peck* and *Watson v. Mercer*.

In the comparatively recent case of *Cummings v. State of Missouri*, 4 Wall. 325, Mr. Justice Field, in delivering the majority opinion, says: "By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rule of evidence by which less or different testimony is sufficient to convict than was required." In the dissenting opinion, *Ex parte Garland*, 4 Id. 390, which stated the grounds of the dissent in *Cummings v. State of Missouri*, *supra*, also, Mr. Justice Miller, speaking of the doctrine announced in *Calder v. Bull*, *supra*, says: "This exposition of the nature of *ex post facto* law has never been denied." These views of the supreme court of the United States upon a clause of the federal constitution, part of what Chief Justice Marshall, in *Fletcher v. Peck*, *supra*, terms "a bill of rights for the people of each state," are of course authoritative, and it is unnecessary to look elsewhere for a construction.

Prior to the passage of our statute of 1866, before cited, the law required marriages in fact to be proved by direct testimony to warrant a conviction for polygamy. By this statute it is manifest that this rule of evidence was changed so as to make "less or different testimony sufficient to convict than was required."

So far as past offenses and indictments found before the act of 1866 took effect (as is the case here) are concerned, the act of 1866 must, under the authorities cited, be held to be *ex post facto*, and therefore not applicable to the trial of this indictment.

For convenience, without following the order of the trial, it is proper here to advert to the charge of the court.

Among other things, the court charged, "that the alleged second marriage might be proven by circumstantial evidence, the sufficiency of which was within the province of the jury to decide, and that a marriage in fact need not be proved by

direct testimony, but that they must be satisfied from the evidence that a marriage in fact had taken place; that the jury must find from the evidence that the defendant had actually married Catherine Flannegan when the defendant knew at the time of such marriage he had a lawful wife living."

It is quite apparent that this charge proceeded upon the ground that the statute of 1866, before referred to, applied to this case.

Holding, as we have, that it did not apply, it follows that the learned judge was in error, and that direct testimony to the second marriage in fact was indispensable to sustain the prosecution.

Catherine Flannegan, the alleged second wife of the prisoner, was put upon the stand by the state, and after testifying in substance that she was not married to the prisoner, was asked on her examination in chief the following question: "Did you ever say to Mrs. Ketchum, while she was stopping in your house in 1865, that you were married to George Johnson in the city of La Crosse?"

The question was objected to by the counsel for the accused, "as being hearsay, and as improper for the purpose of impeaching the witness of the state." The objection was overruled, and the witness answered: "I might have said so. I supposed so long as I resided with him I might as well say we were married."

There was no attempt to show by any other evidence that the witness had made the statement alluded to in the question in more positive terms than she admitted in her answer.

What it may be necessary to hold as to the right of a party to prove that a witness, whom he has called and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, for the purpose of impeaching his testimony, we are not now called upon to determine. The question in this case was addressed to the witness herself, and no attempt was made to impeach her by showing that her answer was false. The time to make this objection, if at all, was when such attempt was made. In *Melhuish v. Collier*, 15 Ad. & E., N. S., 878, Patterson, J., says: "I think the learned judge was right in allowing the questions which were put to the witness herself, though he could not have permitted her answer to be contradicted, if she had remembered her former statements and given evidence of them. There is a distinction between asking questions of a witness in a box, as to state-

ments he may have formerly made, and calling other witnesses to say in contradiction to him that he made such statements. . . . Here, at all events, we think that the objection to the question came too soon, and the counsel was properly allowed to ask the witness Tremlett whether she had not made different statements before." It will be seen by examination that the inquiry as to former statements made by the witness Tremlett, inconsistent with her testimony, was addressed to her on her direct examination by the party whose witness she was. In the same case, Coleridge, J., agrees to the distinction drawn by Justice Patterson; and Erle, J., concurring, proceeds to say: "A plaintiff's witness says, in effect, that the plaintiff has no cause of action. Then he is asked whether he has not formerly made a different statement. I think that question is proper, and not inconsistent with the rule that a party knowing a witness to be infamous ought not to produce him, and must not be allowed to take the chance of his answers, and then bring evidence to contradict him."

The objection that this question calls for hearsay evidence is manifestly untenable. The object is either to lead the witness to correct her testimony, or to save the party calling her from being sacrificed by his witness. The testimony is not substantive; it does not go to establish the issue on trial, and should not be received for that purpose. At the same time, it is no more hearsay in an objectionable sense than it would be if brought out on a cross-examination.

Holding as we do that no evidence was competent upon the question of marriage except direct evidence of a marriage in fact, it is unnecessary to consider the particular objections resting upon other grounds than general incompetency which were made in the progress of the trial to the admissibility of different items of indirect testimony introduced to prove the second marriage.

The general rule which we lay down prohibits their use for that purpose.

We believe that this disposes of all the points made by the counsel for the plaintiff in error, and it follows that for divers reasons the judgment below must be reversed and a new trial awarded.

McMILLAN, J. The weight of authority seems to determine that positive evidence of a marriage is required in cases of this character, although I am unable to discover any ground for this position in the case of *Morris v. Miller*, 4 Burr. 2057,

2059, upon which the authorities rely for the origin of the doctrine; but I find no case except that of *State v. Roswell*, 6 Conn. 447, which directly lays down the position that evidence of admissions, cohabitation, etc., are not competent to support the positive evidence of the marriage. In that case, it does not appear that there was any positive evidence of the marriage, and the inference is, that there was none; and the question under consideration here was not involved in the case, and the force of the decision is impaired by the dissent of two members of the court.

The authorities all agree that for the purpose of proving identity such evidence is admissible. Conceding that positive evidence of the marriage is required, when such evidence is produced I can see no reason why it may not be corroborated and strengthened by any circumstances legitimately tending to that end. Confession and cohabitation would be competent evidence alone of a marriage in most civil actions; it is competent in all, but not sufficient in prosecutions for bigamy, actions for criminal conversation, and other cases in which a marriage in fact must be proved. But in this, as in every other case, express evidence of a marriage in fact may be strengthened and supported by that which tends to prove the same fact, or from which in other actions and proceedings the existence of the fact might be presumed: *Hayes v. People*, 25 N. Y. 396. See also *Gahagan v. People*, 1 Park. Cr. 386. Upon this question, therefore, I regret to differ with my brethren, but I concur in the remaining questions considered in the opinion, and in the disposition of the case.

NEGATING EXCEPTION IN INDICTMENT. — An indictment under one section of a statute need not negative an exception contained in a subsequent section thereof: *State v. Shiflett*, 64 Am. Dec. 190. The case of *State v. Avery*, 67 Id. 754, appears to be in conflict with our principal one upon this question. In this case, the court hold that in an indictment for bigamy under a section of a statute which recites that certain acts shall amount to that offense, "except in the cases mentioned in the following section," the exceptions contained in such section need not be negated.

EX POST FACTO LAW. — A law is *ex post facto* which alters the rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender: See *Hart v. State*, 88 Am. Dec. 752, and note. The principal case is cited, and this question discussed, in *State v. McDonald*, 20 Minn. 136; *State v. Ryan*, 13 Id. 377-379.

IMPEACHMENT OF WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS MADE OUT OF COURT: See *Allen v. Harrison*, 73 Am. Dec. 302, and cases in note; *Champ v. Commonwealth*, 74 Id. 388, and note 398.

BIGAMY, WHAT CONSTITUTES — IS STATUTORY CRIME. — The second marriage of one who had a former husband or wife living was not an offense at common law, nor was it made so in England until in 1604, when, by 1 Jac. I., c. 11, it was made a felony for any person who, having a former husband or wife living, should marry again, unless such former spouse had remained seven years beyond seas; or had remained within the kingdom but away from his or her husband or wife for that space of time, the latter not knowing the other to be alive within that time; or those who had been divorced; or those who when married were within the age of consent, or whose marriage had been declared void. The later legislation in England upon this question will be found in statutes 9 Geo. IV., c. 31, sec. 22, and 24 & 25 Vict., c. 100, sec. 57. These statutes provide, in substance, that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the marriage shall take place in England or elsewhere, such offender shall be guilty of felony, and that the offense shall be tried in the county where the offender is apprehended or is in custody. It is then provided that the act shall not apply to any person marrying again whose husband or wife shall have been continually absent for seven years then last past, and shall not have been known to have been living within that time; or to any person who at the time of such second marriage shall have been divorced from the bonds of the first marriage; or to any person whose former marriage shall have been declared void by the sentence of a court of competent jurisdiction: Bishop's Stat. Crimes, secs. 579-581. In all of the states of the American Union, statutes very similar to the later English enactments have been adopted; and while they vary somewhat, it is not necessary here to point out their minor differences. In Maryland the provisions of 1 Jac. I., c. 11, were early adopted: *United States v. Jennegen*, 4 Cranch C. C. 118; and with very slight modifications still continues to prevail: *Barber v. State*, 50 Md. 161.

Cohabitation after Second Marriage Constitutes Offense. The offense of bigamy is committed by the second marriage; after that time the offense is complete; but under some of the statutes, as in Minnesota, as appears from the principal case, the crime is committed by cohabitation under a bigamous marriage as well as by the marriage itself, whether the marriage takes place within the state or without. This is so in Iowa: *State v. Sloan*, 55 Iowa, 217; *State v. Hughes*, 58 Id. 165; and Massachusetts: *Commonwealth v. Bradley*, 2 Cush. 554. In Vermont it must be made to appear that the second marriage was unlawful in the state where celebrated, in order to make cohabitation under it punishable there: *State v. Palmer*, 18 Vt. 570. In Tennessee and Alabama continued cohabitation under a bigamous second marriage is a separate offense: *Beggs v. State*, 55 Ala. 108; *Finney v. State*, 3 Head, 544.

But cohabitation is not necessary to constitute the offense of bigamy; the parties may immediately separate after the second marriage has been consummated, and they will then be guilty of bigamy: *Gise v. Commonwealth*, 81 Pa. St. 428; *Beggs v. State*, 55 Ala. 108.

Where Second Marriage is Void. — In Michigan, the defense to an indictment for bigamy was made that the second marriage was void under a statute for other reasons than that it was bigamous. In denying the validity of such a defense, the court say that all bigamous marriages are void; that it is the entering into the void marriage while a prior valid marriage exists that constitutes the gist of the offense; that it cannot help matters that there are two elements of illegality in the case instead of one; and that it is no valid reason for relieving a person from the consequences of violating one statute

that the act of doing so violated another: *People v. Brown*, 34 Mich. 339. But in Arkansas, where a man had been married three times, and prior to his indictment his first wife died, the court held that as the second marriage was bigamous and void, it was not sufficient foundation to support a prosecution for bigamy against the defendant in entering upon the third marriage: *Haltbrook v. State*, 34 Ark. 511.

Where First Marriage was between Infants. — In Ohio, marriages by persons under age are invalid unless confirmed by cohabitation after arriving at lawful age, and that such a marriage not thus confirmed does not subject a party to it to punishment for bigamy for contracting a subsequent marriage while the first husband or wife is living: *Shafher v. State*, 20 Ohio, 1. In Arkansas, evidence that the first marriage was contracted within the age of consent is no defense, unless it is shown that the same had been annulled by a court of competent jurisdiction: *Walls v. State*, 32 Ark. 565. In Alabama, a marriage contracted by an infant under the age of consent is not absolutely void, but voidable only, and until disaffirmed, is a marriage in fact, and sufficient to support a prosecution for bigamy in contracting a subsequent marriage: *Beggs v. State*, 55 Ala. 108; *Cooley v. State*, 55 Id. 162. These different constructions are due to differences in the statutes.

Belief that First Husband or Wife was Dead or Divorced. — In a prosecution in Indiana for bigamy, it is proper to charge the jury that if they believe from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, then that they should acquit him: *Squire v. State*, 46 Ind. 459. But this position has not been generally adopted. In New York the court refused to allow a defendant to prove that a justice of the peace had told him, and that he believed, that an agreement which he and his wife signed effected a divorce between them: *People v. Weed*, 29 Hun, 629. The courts of Minnesota hold a similar doctrine: *State v. Armington*, 25 Minn. 29. So in Kentucky, the court say that in bigamy the felonious intent is not an element in the crime which may be rebutted by evidence, and that a person may be guilty of the crime who in good faith believed that he or she had been lawfully divorced: *Davis v. Commonwealth*, 13 Bush, 318. In Texas, a mistake of fact, by defendant, as to the death of his first wife before his second marriage, if such mistake did not arise from the want of proper care, will excuse his second marriage committed under such mistake: *Watson v. State*, 13 Tex. App. 76. The law in Alabama is stricter. In that state a belief founded upon report and rumor that the first husband or wife is dead will not excuse a second marriage, where it afterwards transpires that the first husband or wife is alive. Upon this question the court say: "The legality of a second marriage can but in the single instance expressed in the statute depend upon the ignorance of the party as to the life or death of an absent husband or wife; and that is a continuous absence for five years immediately preceding the second marriage. It was not intended in a matter of so much importance that parties should act upon mere absence nor upon any belief of death not superinduced by higher evidence than mere rumor. And though there may be a continuous absence for five years, that of itself will not excuse a second marriage, if it be known to the party that the absent husband or wife is living. There must be the continuous absence connected with a want of knowledge that the absent party is in life. Whoever marries a second time having a former husband or wife living, absent for a

less period than five years, violates the statute, and is subject to punishment. Belief honestly entertained, founded on mere report or rumor, will not excuse": *Jones v. State*, 67 Ala. 86; *Dotson v. State*, 62 Id. 141. This is the law of Massachusetts; the absence must continue for the full statutory period of seven years, and an erroneous but honest belief of death will not excuse a second marriage within that time: *Commonwealth v. Marsh*, 7 Met. 472. But where the defendant has shown that he has lived separate and apart from his wife for seven years, it is incumbent on the prosecution to show that he knew that she was alive within that time: *Barber v. State*, 50 Md. 162.

Guilty Party to Divorce must not Marry again. — For the purpose of enforcing the statutory provision prohibiting one who has been divorced on account of his misconduct from marrying again during the life of the complainant, and under the statute making it bigamy for a person having a husband or wife living to marry again, a person who has been divorced because of misconduct is regarded as having a "husband or wife living" so long as the complainant lives, and his marriage before that time is bigamy: *People v. Faber*, 92 N. Y. 146; *Commonwealth v. Richardson*, 126 Mass. 34.

PROOF OF MARRIAGE. — The subject of proof or evidence of marriage in criminal cases is treated of in note to *Cameron v. State*, 48 Am. Dec. 115, and here we will only touch upon the subject as specially applicable to prosecutions for plural marriages. In such cases, it is unquestionably true that an actual marriage in fact must be proved, and that marriage will not be presumed as in civil cases. The only question upon which the cases are in conflict is as to the character or amount of evidence necessary or admissible to prove this actual marriage in fact. It however seems to be generally admitted that the former marriage must be shown to have been valid and lawful by the laws of the country or state where it was performed: *Parker v. State*, 77 Ala. 47; *United States v. Jennegen*, 4 Cranch C. C. 120; *People v. Lambert*, 5 Mich. 349; S. C., 72 Am. Dec. 49; *Oneale v. Commonwealth*, 17 Gratt. 582; *King v. State*, 40 Ga. 244; *Weinberg v. State*, 25 Wis. 370; *Bird v. Commonwealth*, 21 Gratt. 800; *Commonwealth v. Henning*, 10 Phila. 209. But it need not be stated in the indictment that the marriage was valid by the foreign law; the statement that it was a marriage implies a lawful marriage: *State v. Hughes*, 58 Iowa, 165.

Generally speaking, marriage in prosecutions of this character is proved like such fact in other criminal cases, and the regular official record is of course the most perfect and satisfactory. Or it may be proved by persons who were present at the ceremony, or by the license with the return thereon filed in the proper office: *Miller v. People*, 2 Scam. 233; *State v. Kean*, 10 N. H. 347; S. C., 34 Am. Dec. 162; *King v. State*, 40 Ga. 244; *Bird v. Commonwealth*, 21 Gratt. 800; *Squire v. State*, 46 Ind. 459; *State v. Williams*, 20 Iowa, 98.

Declarations, Confessions, and Admissions of Defendant. — Much discussion has been had as to whether the confessions, declarations, or admissions of the defendant were admissible for the purpose of establishing the fact of marriage, and it may now be considered as settled that evidence of such facts is admissible; and when it is of a character to satisfy the jury of the fact of marriage, it is sufficient. Clear and deliberate admissions or confessions of defendant that he was married may dispense with other or record evidence of that fact. Confessions of a prior marriage are only evidence of the fact; these confessions and acknowledgments derive their force from the time, manner, and circumstances surrounding them; and when connected with these, they may exhibit the most conclusive or the weakest testimony which can be offered of the fact. It is for intelligent jurors, aided by experienced courts, to weigh

and discriminate their relative forces. In receiving such evidence of marriage, it should be borne in mind that an actual marriage in fact must be shown. When the declarations of the accused, and the fact that he has recognized and cohabited with the woman alleged to be his wife, are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the accused was in fact married to the alleged wife, and unless they so believe, they should acquit though they may believe that he has recognized and cohabited with her as his wife: *Langtry v. State*, 30 Ala. 536; *Finney v. State*, 3 Head, 544; *Commonwealth v. Wentz*, 1 Ashm. 272; *Ham's Case*, 11 Me. 391; *Squire v. State*, 46 Ind. 459; *Williams v. State*, 54 Ala. 131; *Commonwealth v. Henning*, 10 Phila. 209; *Halbrook v. State*, 34 Ark. 511; *Parker v. State*, 77 Ala. 47; *Commonwealth v. Jackson*, 11 Bush, 679; *Miles v. United States*, 103 U. S. 304.

The admissions of defendant of a former marriage, coupled with cohabitation and repute, are evidence tending to prove an actual marriage, upon which a jury may convict: *State v. Hughes*, 35 Kan. 626; *State v. Britton*, 4 McCord, 256; *Oneale v. Commonwealth*, 17 Gratt. 583; *Williams v. State*, 44 Ala. 24; *Scoggins v. State*, 32 Ark. 205. In order to prove a former marriage in England, a witness may testify to the general repute there at a time anterior to his acquaintance with the defendant: *Commonwealth v. Johnson*, 10 Allen, 196; and express evidence of a marriage in fact may be strengthened and supported by that which tends to prove the same fact, such as the way in which a man and woman lived after the time when they were charged to have been married: *Hayes v. People*, 25 N. Y. 390. So in Missouri, it is competent evidence to prove a man's first marriage that he and the woman lived together, and held themselves out to the world as man and wife for years; that they had a family of children living with them as their children; that she had signed and acknowledged deeds as his wife, and that after the bigamous marriage she had sued for a divorce; that he had answered, and that the divorce had been granted: *State v. Gonce*, 79 Mo. 600. But mere cohabitation is not sufficient proof of marriage: *Case v. Case*, 17 Cal. 598; *People v. Lambert*, 5 Mich. 349; S. C., 72 Am. Dec. 49; *Bird v. Commonwealth*, 21 Gratt. 800; *Brown v. State*, 52 Ala. 338.

Clergyman — Need He be Duly Authorized? — In *Hayes v. People*, 25 N. Y. 300, it was held to be immaterial that the parson who performed the marriage was not a regularly authorized minister, but was confederating with the defendant to deceive the woman. The statute in Kentucky so lays down the law: *Robinson v. Commonwealth*, 6 Bush, 309. If the person who performed the ceremony was reputed to be and acted as a minister, this is sufficient *prima facie*: *State v. Abbey*, 29 Vt. 60; S. C., 67 Am. Dec. 754. In *State v. Bray*, 13 Ired. 289, it is said that where a marriage is said to have been performed by a minister, the extent of his authority should appear; and in *State v. Hodgskins*, 19 Me. 155, S. C., 36 Am. Dec. 742, it is said that it is not sufficient evidence of marriage in a criminal prosecution to show that a ceremony was performed, without showing that the person by whom it was performed was clothed with the requisite authority for that purpose.

Wife as Witness. — As long as the first marriage is denied and disputed, the second wife is an incompetent witness for the prosecution. Where it has by other evidence been duly established to the satisfaction of the court, she may be admitted to prove her marriage with him: *Miles v. United States*, 103 U. S. 304; *Finney v. State*, 3 Head, 544; *State v. McDavid*, 15 La. Ann. 403; *State v. Patterson*, 2 Ired. 346; S. C., 38 Am. Dec. 699. But the first and true

wife is not a competent witness for the state: *Williams v. State*, 44 Ala. 24; *Wilson v. Hill*, 13 N. J. Eq. 147. In Iowa, the rule is different, under a statutory construction. The code giving the wife the right to testify against her husband for a crime committed by him against her was held to extend to bigamy: *State v. Sloan*, 55 Iowa, 217.

Statute of Limitations, when Bars Prosecution for Bigamy. — The offense of bigamy is committed and the act completed when the second marriage is consummated, and the statute runs from that time. Unless the indictment is found within the statutory limitation of that time, the prosecution is barred: *Gise v. Commonwealth*, 81 Pa. St. 428; *Beggs v. State*, 55 Ala. 108; *Scoggins v. State*, 32 Ark. 205. In those states, however, where the offense consists as much in the continued cohabitation as in the second marriage, the prosecution is not barred until the limited period after cohabitation has ceased: *State v. Sloan*, 55 Iowa, 217.

First Wife must be Shown to have been Alive at Time of Second Marriage — Presumption of Continuance of Life. — It is indispensable to conviction of bigamy that the first husband or wife be shown to have been alive at the time of the second marriage, and this must be shown to the satisfaction of the jury beyond a reasonable doubt. Where there is no direct evidence that the first husband or wife was alive at the time of the second marriage, there are circumstances under which the jury will be justified in presuming such to have been the case. In *Gorman v. State*, 23 Tex. 646, defendant's first wife was shown to have been alive six months previous to the second marriage, and the court held that it was permissible for the jury, under the circumstances, to presume that she was alive at the time. While defendant's presumptions of innocence might have offset the presumption of continued life, certain admissions which he had made robbed him of its benefit. In *Parker v. State*, 77 Ala. 47, the court say that where the prosecution has shown the former wife to have been alive at a specified time before the second marriage, a presumption arises in favor of the continuance of life, and that it is then incumbent on the defendant to prove her death or continued absence for the five years provided by the statute, and that in such a case no conflicting presumption of innocence arises. In *Commonwealth v. McGrath*, 140 Mass. 296, it is said that "the question whether a person is alive at a certain time, whether a day or a month or a year, or any period less than seven years after direct evidence that he was living, is for the jury, to be determined by the general presumption or probability of the continuance of life, modified by the circumstances of the particular case." That the jury were to judge of the strength of the presumption of the innocence of the defendant as well as of the continuance of the life of his former wife, in view of all the circumstances affecting them, and that if the presumption of innocence was not as strong as the presumption of continued life, they were to find accordingly, or *vice versa*. Where it was shown that after defendant's second marriage his first wife secured a divorce from him, and that she was awarded the custody of their minor child, this was held sufficient *prima facie* to prove that she was alive at the time of his second marriage: *State v. Ashley*, 37 Ark. 403. In *Squire v. State*, 46 Ind. 459, and in *People v. Feilen*, 58 Cal. 218, where there was no direct evidence that the wife was alive at the date of the second marriage, and the evidence showed only that she was alive about two years before that time, this question was discussed at considerable length, and the courts concluded that the presumption of innocence to which defendant was entitled neutralized the presumption of the continuance of life, and that there was a failure of evidence.

Indictment. — As in other cases, an indictment for bigamy is generally held to be good if it follows the statute creating or defining the offense. In Indiana, an indictment for bigamy need not aver the time and place of the first marriage, the person by whom it was solemnized, or the maiden name of the first wife: *Hutchins v. State*, 28 Ind. 34. That it is not necessary to state the place where the defendant was first married was held in *People v. Giesea*, 61 Cal. 53; *State v. Bray*, 13 Ired. 289. In Kansas, neither the time nor place of the first marriage need be set forth: *State v. Hughes*, 35 Kan. 626. In Iowa, the date of the first marriage need not be stated: *State v. Hughes*, 58 Iowa, 165; and so in Massachusetts: *Commonwealth v. McGrath*, 140 Mass. 296; and in Texas, the name of the first spouse may be omitted: *Watson v. State*, 13 Tex. App. 76. The contrary is held in Vermont. Chief Justice Redfield says that the first marriage is a traversable fact, and as such, under the uniform rule applicable to indictments, must be distinctly alleged with time and place: *State v. Le Bore*, 26 Vt. 765. This ruling is distinctly adopted in Kentucky: *Davis v. Commonwealth*, 13 Bush, 318.

Venue in Prosecutions for Bigamy. — The crime of bigamy consists in contracting the second marriage, the party having a previous husband or wife living. The offense is completed by such marriage, and the place where the marriage occurs is the place where the crime is committed within the meaning of the criminal law. Consequently the venue in the indictment is laid at the place where the second marriage took place, and this is the place where the prisoner must be tried: *Finney v. State*, 3 Head, 544; *Williams v. State*, 44 Ala. 24; *Beggs v. State*, 55 Id. 108; *Walls v. State*, 32 Ark. 565; *State v. Barnett*, 83 N. C. 615; *State v. Fitzgerald*, 75 Mo. 571; *State v. Hughes*, 58 Iowa, 165. In such of the states as make cohabitation under a bigamous marriage amount to the crime, the venue may generally be laid and the prisoner tried in the county where the accused is in custody or has been apprehended: *State v. Sweetsir*, 53 Me. 438; *Collins v. People*, 1 Hun, 610; *State v. Fitzgerald*, 75 Mo. 571. As was said in the principal case, if both marriages occurred without the state, and the law does not provide for punishing cohabitation under a bigamous marriage, the offense committed is not an offense against the laws of the state, and the prisoner cannot be convicted of bigamy: *People v. Mosher*, 2 Park. Cr. 195.

CASES
IN THE
HIGH COURT OF ERRORS AND
APPEALS
OF
MISSISSIPPI.

WARE v. HOUGHTON.

[41 MISSISSIPPI, 370.]

SALES BY EXECUTOR OR ADMINISTRATOR ARE VOID IF MADE WITHOUT ORDER OF COURT, or in any manner not authorized by law; and property so sold may be recovered by the distributees or legatees from the parties holding it under the sale.

WARRANTY OF TITLE IS NOT IMPLIED IN SALES BY EXECUTORS, ADMINISTRATORS, OR TRUSTEES; the maxim *caveat emptor* applies both in regard to title and to soundness or quality.

WANT OF TITLE CANNOT BE SET UP AGAINST PAYMENT OF PURCHASE-MONEY by a vendee of real property who has protected himself by covenants of warranty, unless he shows a previous eviction, or in cases where there has been fraud; and this rule applies to personal as well as real property.

PURCHASER OF PERSONAL PROPERTY FROM EXECUTOR OR ADMINISTRATOR, at a sale under a void order of the probate court, may, as a defense against the payment of the purchase-money, show a previous eviction, or a return or offer to return the property within a reasonable time after discovering the defect in the title, thereby rescinding the contract of sale.

PURCHASER WITH WARRANTY ELECTING TO RESCIND SALE FOR SOME DEFECT IN TITLE OR QUALITY must forthwith return or tender back the subject-matter of the sale, or give notice to the seller to take it back; and if instead he keeps the property an unreasonable time, or uses it and exercises the dominion of an owner, he cannot treat the sale as void.

CONTRACT CANNOT BE RESCINDED IN TOTO BY ONE PARTY UNLESS BOTH CAN BE PLACED in the identical situation which they occupied at the time of the contract.

PURCHASER WHO BECOMES UNABLE TO RETURN PROPERTY BEFORE HE DISCOVERS DEFECT OF TITLE of the vendor is remediless unless he has protected himself by covenants of warranty; and this rule applies to sales by executors and administrators.

PERSON WHO DERIVES TITLE THROUGH OR UNDER JUDICIAL PROCEEDING is chargeable with notice of whatever appears in the record.

PURCHASER OF SLAVES AT SALE UNDER VOID ORDER OF PROBATE COURT cannot plead as an excuse for failure to rescind, by returning or offering to return the slaves, the fact that he did not discover the defect of title until after emancipation of the slaves, and that he could not then return them.

DEBT. The opinion states the facts.

Sale, Phelan, and Dowd, for the plaintiffs in error.

Davis, Haughton, and Gholson, for the defendants in error.

By Court, ELLETT, J. The defendants in error brought an action of debt against the plaintiffs in error, in March, 1866, founded on a bill single, dated December 16, 1859, for \$3,890.50, payable twelve months after date.

The defendants pleaded two pleas: 1. As to \$1,300, parcel of the sum demanded, payment before suit brought; and 2. As to the residue of the sum demanded, that part of the consideration of said bill single was the purchase of certain slaves of the estate of Brandon for the price of \$2,670, sold by the plaintiffs below, as executors as aforesaid, on the 12th of December, 1859, under a supposed order of sale made by the probate court of Monroe County at November term, 1859, for the purpose of an equal division of such slaves among the parties interested therein; that a number of the legatees of said testator interested in said slaves were not summoned or lawfully notified of said proceedings, and did not appear thereto, wherefore the order of sale and the sale itself were void, and did not divest the title of the estate of Brandon to the slaves; that the slaves have become emancipated by the act of the government of the United States, and are free persons, and as such beyond the power of defendants to return or offer to return the same to the plaintiffs; that the defendants did not discover the defect of title until after the emancipation of the slaves, and during the term at which the plea was filed, and so they say that the consideration of said bill single has failed as to the said sum of \$2,670.

To this plea of failure of consideration, the plaintiffs below demurred, and the court sustained the demurrer, and this is the only error complained of.

The grounds relied on as causes of demurrer to the plea are mainly that the defendants do not allege or show any eviction or disturbance of their possession by superior title; that they

did not return or offer to return the slaves in a reasonable time; that the excuse set out for not returning the slaves is insufficient; and that the defendants did not offer to pay for the use and services of the slaves while in their possession from the time and sale in December, 1859, to their emancipation.

It has been settled by repeated decisions of this court, that a sale of slaves, by an administrator or executor, at private sale, or in any manner not authorized by law, was void, and that the slaves might be recovered by the distributees or legatees, from the persons holding under such sales: *Cable v. Martin*, 1 How. 556; *Bains v. McGee*, 1 Smedes & M. 208; *Worten v. Howard*, 2 Id. 527 [41 Am. Dec. 607]; *Hull v. Clark*, 14 Id. 187. These were all cases of suit, at law or in equity, by the distributees or legatees, to recover the property wrongfully sold. The first case we find in which the question was made as to the validity of a sale of personal property, where the objection was made by the purchaser, that the order of sale of the property for the purpose of equal division among the heirs was given by the court, without all the parties interested having been summoned, as required by the statute, is that of *Joslin v. Caughlin*, 26 Miss. 134. In that case the purchaser of the property at the sale set up these facts as a defense against the collection of the purchase-money, and the court said that the decree being void for want of notice to the parties, no title passed by the sale, and hence the consideration of the note had entirely failed. It is evident that the attention of the court was confined to the question of the invalidity of the order of sale, and was not directed very strongly to the effect which such naked invalidity, standing alone, was entitled to have upon the rights of the parties. Accordingly, when the same case came again before the court in the following year on a replication stating that the purchaser still retained the quiet possession of the slave, it was promptly decided that, without having made an offer to return the slave to the plaintiff, the defendants could not resist the payment of the note, notwithstanding the invalidity of the order of sale: *Joslin v. Caughlin*, 27 Miss. 852. The case having been again sent back, the defendants rejoined to the replication, that the slave died before the suit was commenced; and the sufficiency of this rejoinder being brought before this court, it was held to be too vague and uncertain to constitute a defense. The defendants, it is said, "were bound either to return the slave

in a reasonable time, or to show a good excuse for not doing so": *Joslin v. Caughlin*, 30 Miss. 502. The case was remanded, and then the defendants amended their answer by alleging that the slave died before the obligation became due, and before they discovered the illegality of the sale, and therefore could not be returned. To this the plaintiff replied that the slave came to her death by the ill treatment, neglect, and violence of the defendants. A demurrer was sustained to this replication, and the case was brought to this court for the fourth time. It was then held that the answer offered no sufficient excuse for the failure to return the slave; and that, upon the pleadings, it appeared that the plaintiff had lost the property by the unjustifiable conduct of the purchaser. "He was bound, said the court, to restore the plaintiff in his rights, before he could set up the defense of failure of title; and he can certainly take no benefit from his failure to do so, when that failure has arisen from an additional wrong": *Joslin v. Caughlin*, 32 Miss. 104. We have quoted so much from the various decisions in that case, because they contain all that the court has said at any time in reference to excuses for not returning the property, and it is clear that the law on that point was not, in that case, made the subject of particular examination or discussion.

In the mean time, in the case of *Bohannon v. Madison*, 31 Miss. 348, the rule had been laid down more broadly. It is there said: "By their purchase, they acquired possession of the slaves; and if the sale was void, they should have instantly returned the property to the executor. . . . Parties who set up the illegal action of the executor or administrator, as a defense for not performing their contract, ought either to return or offer to return the property." And again, in *Washington v. McCaughan*, 34 Miss. 304, it was said: "The rule is now firmly settled in this court in regard to a sale of personal estate by an administrator, that the purchaser retaining possession, and not offering to restore the property to the administrator, shall not be permitted to resist the payment of the purchase-money on the ground that the sale was invalid."

The general rule of law is, that upon a sale of personal property, the law implies a warranty of title; but it is equally well settled that in the case of sales by executors, administrators, and other trustees, there is no such implied warranty, and that the maxim *caveat emptor* applies in such cases, both in regard to the title and soundness or quality of the property

sold. And where the vendee has protected himself by covenants of warranty, and is put in possession, he cannot defend himself against the payment of the purchase-money without a previous eviction, unless in cases where there has been fraud. This rule applies as well to personal as to real property, and where there is no warranty, express or implied, and no fraud, the purchaser is without remedy.

But in the case of sales of personal property by an executor or administrator under a void order of the probate court, the decisions above quoted give the purchaser a remedy for the failure of title, although there is no warranty, no eviction, and no fraud. This relief is afforded as in cases where there is a warranty of title or soundness, and the purchaser is desirous to rescind the contract *in toto*, on the ground of some defect existing in the title or quality of the property. A purchaser under such circumstances may proceed in two modes: he may keep the property, and defend the action by showing a partial failure of consideration, and a breach of the warranty to that extent; or he may rescind the contract, by returning the property. If the complaint be of the want of title, he must show a previous eviction, or he must return the property. In this case, there being no warranty, the decisions alluded to give the purchaser the right to defend himself against the payment of the purchase-money, by returning or offering to return the property within a reasonable time after discovering the defect of title, and thereupon rescinding the contract of sale. And the question presented on this record is, whether in such cases any excuse will be admitted for not returning the property, and if so, whether the excuse stated in the plea is sufficient.

The rule on this subject appears to be stated in the books without any qualification. Thus "if the purchaser elect to treat the same as a nullity, he must forthwith return or tender back the subject-matter of the sale, or give notice to the vendor to take it back; for if the purchaser keeps it an unreasonable time, or uses it, and exercises the dominion of an owner over it, he cannot afterwards treat the sale as a void sale and recover the purchase-money on the ground of failure of consideration: Addison on Contracts, 273. And he must put the other party *in statu quo*, by an entire surrender of possession, and of everything he has obtained under the contract: *Voorhees v. Earl*, 2 Hill, 288 [38 Am. Dec. 588]; *Masson v. Bovet*, 1 Denio, 69. And if one party have already received benefit from the contract, he cannot rescind it wholly, but is put to his action

for damages: Story on Contracts, 1080, sec. 977. A contract cannot in general be rescinded *in toto* by one of the parties where both of them cannot be placed in the identical situation which they occupied when the contract was made: Chitty on Contracts, 485, 689, 691, 815.

We do not find the doctrine anywhere stated that the purchaser can, in any case or under any circumstances, rescind the contract without a return of the property or an offer to return it. The very idea of rescinding a contract implies that what has been parted with shall be restored on both sides. That one party shall be released from his part of the agreement, and that he shall be excused from making the other party whole, does not seem agreeable to reason or justice. If, on the contrary, a party by any cause becomes unable to return the property before he discovers the defect of title, it would seem more equitable that he should be left to his recourse on his covenants, and if he has not protected himself by covenants, that he should be without remedy.

In the present case, the purchaser had the possession and use of the property for nearly six years, and until the title was destroyed by act of the government. He had all the beneficial enjoyment of the property which he could possibly have had if the title under the executor's sale had been perfect. To allow him now to rescind the sale would be to permit him to retain all the benefit, profit, and advantage of the labor of the slaves for nearly six years without making any compensation. Such a conclusion would be full of injustice to those interested in the estate. The means always existed near at hand to discover the true state of the title, and a very little diligence would at any moment have disclosed the defect. If men choose to make large investments of money, without taking any of the ordinary precautions to assure themselves that they are obtaining a good title, courts ought not to lend too indulgent an ear to their complaints, even when they come freshly after the transaction for relief. But when parties have slept on their rights for over six years, when the statute of limitations would itself have made their title perfect by cutting off all remedy from those supposed to possess the superior title, they present themselves with no claim to the favorable consideration of a court of justice. The rule of diligence ought to be the more stringent where the means of information are of record in the county, and where the title is deduced under the judgment or decree of a court easy of access, and open at all times

for examination. Indeed, it is a familiar general principle that a party deriving title under or through a judicial proceeding is charged with notice of whatever appears by the record. It is not necessary to apply this principle to the present case, for without it, the long delay of the parties would be sufficient to preclude them from setting up the defense.

We think, therefore, there was no error in sustaining the demurrer to the second plea, and as this is the only error assigned, the judgment will be affirmed.

SALES BY EXECUTORS OR ADMINISTRATORS ARE VOID unless made by order of court or as authorized by law: See *Walbridge v. Day*, 83 Am. Dec. 227, and note. The principal case is cited in *Clark v. Hornthal*, 47 Miss. 486, where the court say that the Mississippi statute does not change the common-law rule that sales may be made otherwise than by order of court if the will so direct, and that the principal case does not so hold.

EXECUTORS OR ADMINISTRATORS CANNOT BIND ESTATE BY WARRANTIES of property sold, and hence none is implied: See *Able v. Chandler*, 62 Am. Dec. 518, and note. *Caveat emptor* is the rule: *Walbridge v. Day*, 83 Id. 227, and note; and *Miller v. Palmer*, 55 Miss. 338, citing the principal case.

PERSON DERIVING TITLE FROM JUDICIAL PROCEEDINGS is chargeable with whatever appears of record: *Jagers v. Griffin*, 43 Miss. 138; *Storm v. Smith*, 43 Id. 503; *Learned v. Corley*, 43 Id. 707.

RESCISSION, HOW AND WITHIN WHAT TIME RIGHT MUST BE EXERCISED: See the note to *Bryant v. Isburgh*, 74 Am. Dec. 657-662. The principal case is cited in *Whitworth v. Carter*, 43 Miss. 74, to the point that the right must be exercised within a reasonable time or it will not avail.

IF ADEQUATE REMEDY AT LAW EXISTS, fraud will not confer jurisdiction upon courts of equity: *Learned v. Holmes*, 49 Miss. 300, citing the principal case.

STATE v. MCGINTY.

[41 MISSISSIPPI, 435.]

MISSISSIPPI STATUTE PROHIBITING PROSECUTION OF ACTIONS OR SUITS FOR DEBT against southern soldiers who have been called into active service by the state authorities, while such soldiers are or may be engaged in the military service of any of the southern states, is constitutional.

ORDINANCE OF MISSISSIPPI CONVENTION OF 1861 TO RAISE MEANS FOR DEFENSE of the state, and the tax levied in consequence thereof, were rendered void by the ordinance of the convention of 1865, which declared the fundamental act of the convention of 1861 to be null and void, and the state can assert no rights founded on and proceeding from those acts.

DEBT. The opinion states the facts.

C. E. Hooker, attorney-general, for the plaintiff in error.

J. B. Coleman, for the defendant in error.

By Court, HANDY, C. J. This action was brought against the defendants in error, the principal and sureties on a bond executed by McGinty as tax collector of Jefferson County, to recover moneys collected under the ordinance of the state convention of 1861, entitled "An ordinance to raise means for the defense of the state," the moneys sued for being a special tax imposed under that ordinance.

The principal and one of the sureties demurred to the declaration; and the other surety pleaded in abatement that, at the time of the commencement of the suit, he was a southern soldier duly enlisted and mustered into the service of the state of Mississippi, and actually engaged in the military service of said state, and had been called into actual service by the authorities of said state. To this plea the state demurred, and on the hearing of both demurrers the former was sustained, and the latter was held to be insufficient in itself; but the error was extended back to the declaration, which was adjudged insufficient, and judgment was given for the defendants. These rulings of the court are the errors here assigned.

1. No suggestion is made in behalf of the state of any ground on which the plea filed in this case was not valid; and we can perceive none, unless it be that the act of the legislature on which it was founded is unconstitutional.

But the act does not appear to us to be obnoxious to this objection. It is in effect a regulation in regard to process against parties who were so situated as in the judgment of the legislature to be disabled from giving their attention to suits which might be brought against them, and from protecting their interests therein. They were compelled to be in actual service in the army; and the nature of that service put it out of their power to attend courts, to consult counsel, and to attend to the various matters in which the protection of their rights in suits against them might require their personal attention. It was therefore just and proper that the right to sue them should be suspended; and it stands on the same principle as if had been enacted that, during their absence from home, it should not be lawful to serve process upon them by leaving copies at their places of residence.

The suspension of such suits does not proceed on the pur-

pose of depriving the creditor of the benefit of his legal right to sue, but on the just policy that the defendant was in the military service of his country, which, for the time deprived him of the power to protect his private interest; and that, as he was in a state of legal duress, he should suffer no detriment in his rights which he was prevented by law from protecting.

Our statutes contain many recognitions of this principle, sometimes for the protection of defendants and sometimes of plaintiffs. The exception of nine months after grant of administration within which the administrator is not allowed to be sued is on this principle; and of the same character are the provisions that if any plaintiff shall at the time of the accrual of the cause of action be under the disability of infancy, coverture, imprisonment, idiocy, etc., or absence beyond the limits of the United States on business of the state; or shall be prohibited by law, or restrained, or enjoined from commencing or prosecuting any action, the time of such disability or restraint shall not be computed as part of the time of the running of the statute of limitations: Rev. Code, 400, art 12; Id. 402, art. 26. It appears, therefore, that the act worked no more injury to a plaintiff than would have arisen to a defendant by an enlargement of the period of limitation in commencing an action, and that it stands on the same principle as a statute of limitations or one altering the mode of service of process. We therefore consider it free from objection on the ground of constitutionality, and are of opinion that the demurrer to the plea should have been overruled.

2. The second assignment of error is also well taken.

The ordinance of the convention of 1861, under which the tax in question was levied, was an essential part of the proceedings of that body by which this state was declared to be withdrawn from the Union. By the ordinance of the convention of August, 1865, the fundamental act of the convention of 1861 was declared to be null and void, and all the acts and ordinances of that convention, in direct furtherance of the secession of the state from the Union, necessarily were rendered void. Of this character is the ordinance to raise means for the defense of the state in the position of independence assumed under the ordinance of 1861. That act, and all the benefit and rights arising to the state under it, became illegal and void in virtue of the ordinance of August, 1865, and must be so held as a legal question. And the state,

being the author of the act of secession and of the ordinance passed for the purpose of raising means in aid of it, can assert no legal right in court founded on those acts, and directly proceeding from them. This is the clear and unavoidable result, in a legal point of view, of the right of the state involved in the claim attempted to be recovered in this case; and we are bound to hold that the demurrer to the declaration was properly sustained; and the judgment must be affirmed.

ELLETT, J., did not sit in this cause.

HARVEY v. KELLY.

[41 MISSISSIPPI, 490.]

VENDOR MAY FILE BILL TO ENFORCE HIS LIEN UPON FAILURE OF VENDEE TO PAY, although the price was to be paid in specific articles, and not in money.

EXPRESS RESERVATION OF VENDOR'S LIEN IN DEED AMOUNTS TO EQUITABLE MORTGAGE; and the rights of the vendor and vendee depend on their contract, and not on mere implication of law.

TO CREATE VENDOR'S LIEN, THERE MUST BE DEBT FOR UNPAID PURCHASE-MONEY in fixed amount, due directly to the vendor. If the vendee's obligation consists of a collateral covenant, or is for the discharge of the liability of a third person, and the conveyance is absolute, no lien is retained.

WHILE WRITTEN EVIDENCE MAY BE FILED AS EXHIBITS, AND REFERRED TO as part of the pleading, good pleading requires that the substance of such evidence shall be set forth by proper averments in the pleading.

BILL in equity. The opinion states the facts.

Benjamin King, for the appellant.

H. B. Mayes, for the appellees.

By Court, ELLETT, J. The appellant filed his bill in the chancery court of Copiah County to enforce a lien on certain land for the unpaid purchase-money. The bill alleges that complainant and the defendant Kelly were joint owners of the land in question, and that on the 28th of October, 1861, complainant sold his interest, which was one half, to Kelly, for the consideration of \$2,520.22; the deed is filed as exhibit A; that Kelly gave his note for the purchase-money, dated October 30, 1861, which is filed as exhibit B, and that said note is unpaid, except \$1,080, which is credited on it; that Kelly, about the 6th of January, 1862, conveyed an undivided half

of the land to Witham, who reconveyed it to Kelly, and that Kelly, about the 2d of January, 1863, conveyed an undivided half of the property to A. J. Johnson; that Witham and Johnson respectively had notice before the said conveyances to them that the said note for the purchase-money was executed for that purpose, and was still unpaid, except as to the credit above mentioned. The bill claims and seeks to enforce a vendor's lien on the property.

The deed filed as exhibit A is dated October 28, 1861, but is acknowledged by the grantor on the 30th of October.

It recites that the consideration is \$2,300.70, and it contains an express reservation of a vendor's lien for the purchase-money.

The note filed as exhibit B is dated October 30, 1861, the day on which the deed was acknowledged, is for the sum of \$2,520.22, payable January 1, 1863, and recites on its face that it was given for the purchase-money of the land. Annexed to it is an agreement between Kelly and complainant that the money shall be paid in lumber at ten dollars a thousand, delivered on the cars at Kelly's mill, the bill to be furnished by complainant three months before the maturity of the note.

A supplemental bill was filed to bring in the heirs of Johnson, who died before the service of the process, and amendments were made alleging that complainant furnished Kelly bills for the lumber in the time and manner specified in the agreement annexed to the note, and that Kelly has no property out of which the money could be made.

To the bill thus revived and amended, Kelly, Witham, and two of the heirs of Johnson demurred for want of equity on the face of the bill, which demurrer was sustained, and the bill dismissed.

The ground assumed in argument in support of the judgment of the court below is, that the original agreement for a money consideration of \$2,300.70, as expressed in the deed, was subsequently rescinded, and a new agreement substituted, by which lumber to the value of \$2,520.22 was to be delivered in payment for the land; and that when anything else than money is agreed to be paid, the vendor's equitable lien does not exist.

It does not strike us that this is a correct view of either the facts or the law of the case. On the contrary, the note is contemporaneous with the execution of the deed. The latter, it is true, bears date two days previously, and recites that the con-

sideration was \$2,300.70 cash paid in had, and at the close of it reserves a lien on the land for its security, reciting that the statement of its being paid was an error in fact. The note shows on its face that it was given for the purchase-money of the land, and it is for the payment of money absolutely. The addition of interest from its date to its maturity on the amount of the purchase-money, \$2,300.70, would make the amount for which the note was given.

The agreement of the same date written at the foot of the note that the same should be paid in lumber at a stipulated price was a mere agreement as to the mode in which the money, for the mutual convenience of the parties, might be paid, and did not change the nature of the transaction. On failure to pay in the manner agreed upon, the debt was again payable in money, and the complainant was left in the full enjoyment of all his rights.

The vendor's lien, being expressly reserved by stipulation in the deed, amounted to more than the equitable lien of the vendor, as implied by the law from the relation of vendor and vendee. It constituted an equitable mortgage, as ruled by this court in the case of *Stratton v. Gold*, not yet reported, and greater prominence might with much propriety have been given in the bill to this view of the case. Where an express lien is thus reserved by the stipulations between the parties, the law does not raise the implied lien, and the rights of the parties depend on their contract, and not on the mere implication of law.

It is indeed admissible to a certain extent in pleading in chancery to file written evidence as exhibits, and to refer to them as a part of the bill or answer, but good pleading requires that everything that is material to the case should be set forth in the pleading itself by proper averments. This may be done in general terms, and the exhibit may be referred to for greater certainty as to particular details, but the pleading ought to contain the substance of the case. It is unnecessary for us to say whether the bill in this case would have stood the test of a demurrer on the ground of its loose and indefinite statements, inasmuch as that question has not been presented to us. Enough appears to show that the complainant has substantial rights of which he is deprived by the decree.

The case of *Patterson v. Edwards*, 29 Miss. 67, is much relied on by the appellee's counsel as an authority in his favor; but we do not think it applicable to the case. There the pur-

chaser, in addition to the payment of a sum of money in cash, agreed also to take up certain notes of the vendor held by a bank, and the question was, whether there was an implied lien in equity on the land as security for the performance of this agreement. And this question was answered in the negative, because there was no debt for unpaid purchase-money to a fixed amount due directly to the vendor, but only a covenant by the vendee to pay the debts due by the vendor to the bank. The present is a very different case, and would be so if no express lien had been reserved.

The decree allowing the demurrer and dismissing the bill is reversed, and the cause remanded, with leave to the adult defendants to file their answer within sixty days, and for proper proceedings against those who are under age.

VENDOR'S LIEN MAY BE ENFORCED THOUGH PRICE WAS TO BE PAID in articles other than money: *Deason v. Taylor*, 53 Miss. 700, citing the principal case.

THOUGH WRITINGS ARE FILED AS EXHIBITS, AND REFERRED TO IN PLEADINGS, it is required that the substance of the writing shall be set forth in the pleading: *Terry v. Jones*, 44 Miss. 542.

RUSSELL v. WATT.

[41 MISSISSIPPI, 602.]

GRANTOR IS DEFINED TO BE ONE WHO GIVES, BESTOWS, OR CONVEDES a thing, and in legal parlance is understood to be one who executes a deed or conveyance, and may be distinguished from a vendor, who is a seller, or a person who disposes of a thing for money.

VENDOR'S LIEN MAY BE ENFORCED IN FAVOR OF ONE WHO IS NOT GRANTOR of the land, and though the deed to the vendee is executed by a third person. Thus the owner of land made a parol gift of it to his daughter. She sold the land to another, taking his notes for the price. The grantor executed the conveyance to the vendee, and the price not having been paid, the vendee (the daughter) was permitted to enforce her lien therefor.

PURCHASER OF LAND FROM ONE WHO ACQUIRED IT BY PAROL GIFT from her father, and who gave to her vendee her father's conveyance of the same, is estopped, in an action by the vendor for the price, from setting up as a defense that the gift to the daughter was void because not in writing, or from setting up title adverse to that conveyed by the deed.

BILL in equity. The opinion states the facts.

James Somerville, for the plaintiffs in error.

J. Z. George, for the defendants in error.

By Court, JEFFORDS, J. The bill in this case alleges that in the year 1860 Mary E. Russell was the owner in her separate right, and held as her separate property under the laws of this state, certain real estate, with the buildings thereon, lying in the county of Carroll; that the said lands were given to her by William Booth, her father, as a marriage portion; that said Booth neglected to execute a deed for said lands to his daughter, Mrs. Russell, and never made any written conveyance of the legal title, or any written memorandum of said gift, until called on by Russell and wife to make a deed to one Jack Moore in the year 1860; that she was placed in possession in the year 1848, and after erecting all of the improvements which were upon the place, continued to occupy the same as a residence until the sale to Moore; that on the fourteenth day of January, 1860, Russell and wife sold to said Moore, and procured the said Booth to make a deed for the said lands directly to Moore; that the price agreed to be paid by Moore was \$2,250 or \$2,500, but which of said sums not precisely remembered; that Moore has never had his deed recorded; that all of the purchase-money, except \$675, has been paid by Moore, which amount, with interest from the date of sale, remains due and unpaid; that on the — day of —, 1860, Moore sold said lands to one George Vasser, and attempted to convey title to Vasser, but conveyed a wholly different and distinct tract of land; that Vasser well knew at the time of his purchase from Moore that the purchase-money due from Moore to Russell and wife had not been paid in full, and that a certain balance remained unpaid; that repeated attempts were made to secure the payment of the said balance due by Moore from the purchase-money due by Vasser, about the time of his purchase, with the concurrence of Vasser, which attempts were frustrated by circumstances over which Vasser had no control; that there is a much larger amount due from Vasser to Moore's estate than is due to Russell and wife.

The bill concludes with a prayer asking for the enforcement of a vendor's lien for the amount of the purchase-money still due.

The defendants demurred to the bill for the following causes: 1. That from the bill it appears that William Booth was the grantor in the deed to Jack Moore, and that no lien arises from said deed in favor of the complainants; 2. That if it be true, as alleged in said bill, that the land belonged in law or equity

to the said Mary E. Russell, then the sale was void for want of a conveyance by her to said Moore according to law; 3. The bill is uncertain and ambiguous as to stating who was the owner.

Upon the hearing the chancery court sustained the demurrer, and pronounced its decree accordingly.

The demurrer necessarily admits as absolutely true all of the material allegations of the bill. It is assumed in the argument as well as by the demurrer that the terms "grantor" and "vendor" are precisely synonymous. Is this so? A grantor is one who gives, bestows, or concedes a thing; and in legal parlance, is understood to be the party who makes and executes a deed or conveyance.

A vendor is a seller; a person who disposes of a thing for money.

Who was the seller? Who disposed of the thing? Who actually delivered possession of the thing sold, and received that portion of the consideration money which was paid at the time of sale? Most certainly it was not Booth, the grantor; but Russell and wife, the vendors. Booth was nominally grantor, it is true, but without an interest. He was, in no proper sense, however, a vendor.

He was the mere contrivance or instrument made use of for the purpose of transferring what belonged to and had been sold and disposed of by another party.

The court has in effect decided this very point in the case of *Holloway v. Ellis*, 25 Miss. 103. In that case, the court enforced a vendor's lien in favor of Ellis, who purchased of Sargent, without taking a deed. Ellis afterwards sold to Cook, agreeing to make or procure a title by a specified time. Sargent, at the request of both parties, conveyed to Cook directly.

Here the legal title never was in Ellis, but he was a seller—a vendor—without being a grantor, and his lien as such was recognized and established. Not only is this the rule in Mississippi, but it is remarkably well defined in other states: *Stewart v. Hutton*, 3 J. J. Marsh. 178; *Ligon v. Alexander*, 7 Id. 289.

It is urged by the demurrer, also, that even admitting Mrs. Russell was the holder of the legal or equitable title, the sale was void for want of a conveyance according to law. This position is wholly untenable both in law and fact, for the contract was not absolutely void, but only voidable.

As to the question of fact, it is alleged in the bill, and by

the rules of law admitted by the demurrer, that a written conveyance was made and fully executed according to law by the delivery of the deed to Moore, which he accepted. He is precluded from going behind it; nor can any person claiming under him inquire whether the original parol gift from Booth to Mrs. Russell could or would have been enforced as against the donor, had he refused performance. Nor is it necessary for this court to determine whether Mrs. Russell, by upwards of ten years' adverse possession under the statute of 1844, had acquired the legal title to said lands.

It is immaterial, so far as the present controversy and parties are concerned, whether her title was a legal or an equitable one, as this was a question exclusively between the father and daughter, which was not made at a time when it could have been urged; and now that the gift from Booth has been carried out and perfected in good faith, and the contract from Russell and wife to Moore has been completely executed, it is impossible to raise the question; it would be useless folly to discuss it.

It seems to us that no case ever appealed more directly and strongly to the conscience of a chancellor. The money is admitted to be due from Moore to Russell and wife, and from Vasser to Moore, who admits that he had notice, and is still in the possession and enjoyment of the lands sold. No person can be injured by establishing the vendor's lien in this case, in even the slightest possible degree.

The decree of the court is reversed, the demurrer overruled, and the cause remanded to the court below for further proceedings in accordance with the principles of this decision, with leave to defendants to answer within sixty days.

DISTINCTION BETWEEN GRANTOR AND VENDOR made in the principal case is approved in *Perkins v. Gibson*, 53 Miss. 704, 709, 710, 717.

VENDOR'S LIEN MAY BE ENFORCED IN FAVOR OF ONE who is not grantor of land: *Davis v. Pearson*, 44 Miss. 511, 513; *Anderson v. Spencer*, 51 Id. 871, 872, citing the principal case.

NO ONE EXCEPT PURCHASER FOR VALUE CAN RESIST VENDOR'S CLAIM: *Doyle v. Orr*, 53 Miss. 232, citing the principal case.

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BAKER v. KELLY.

[41 MISSISSIPPI, 696.]

INSTRUCTION CHARGING WITHOUT QUALIFICATION THAT DECLARATIONS AND ADMISSIONS of a party are not evidence in his favor is erroneous.

DECLARATIONS OF PARTY ARE ADMISSIBLE AS EVIDENCE IN HIS FAVOR when part of the *res gestæ*, or where such declarations are necessary to explain an act which takes its character from the design and intention of the party who does it.

EVIDENCE OF HIS ACTS AND DECLARATIONS MADE ANTE LITEM MOTAM, and at a time when he could have no reasonable motive to misstate facts, are admissible where the intentions of a party are sought to be established to show what his intentions were.

ACTS AND DECLARATIONS OF DEFENDANT MADE BEFORE SUING OUT ATTACHMENT are admissible as evidence in his favor, on the trial on an issue as to whether or not the defendant was about to remove out of the state.

CERTIFICATE OF COMMISSIONER TO DEPOSITION WHICH STATES THAT WITNESSES "were duly sworn true answers to make to the interrogatories and cross-interrogatories," is a substantial compliance with the requirements of the Mississippi statute.

PROMISSORY NOTE INDORSED IN WORDS "I ASSIGN THE WITHIN TO K. for value received, and bind myself to paying it promptly after maturity, if not paid by the drawers at maturity," imposes on the indorser the liability the guarantor, and in such a case, upon the failure of the makers to pay at maturity, the holder may recover the amount of the note without proof of demand and notice.

TO FIX LIABILITY OF GUARANTOR OF PROMISSORY NOTE, acceptance and notice by the holder, as in cases of letters of credit with guaranty, are unnecessary, and it is likewise unnecessary upon failure of the makers to pay at maturity, to make demand and give notice as in ordinary cases of indorsements.

ATTACHMENT. The opinion states the facts.

Johnston and Johnston, for the plaintiff in error.

Potter, for the defendant in error.

By Court, PEYTON, J. The defendant in error sued out an attachment against the plaintiff in error, on the ground that the plaintiff in error was about to remove himself out of this state, returnable to the circuit court of Hinds County for the second district.

At the May term of said court, 1866, the defendant in the attachment filed a plea in abatement, traversing the truth of the alleged cause for which said attachment was sued out, and upon issue joined thereon there was a trial and verdict for the plaintiff in attachment.

The defendant below moved to set aside said verdict, and for a new trial, on the following grounds: 1. The jury

found contrary to the evidence; 2. The court erred in giving instructions for the plaintiff; 3. The court erred in refusing one of defendant's instructions; and 4. The jury found contrary to law,—which motion was overruled by the court. To which judgment of the court, in overruling said motion, the defendant excepted.

The defendant then pleaded *non assumpsit* to the action, on which there was a trial, which resulted in a verdict and judgment in favor of the plaintiff for \$6,596.56.

From which judgment the plaintiff in error prosecutes this writ of error, and makes sundry assignments of error, of which it will be necessary to notice only the first, second, third, seventh, tenth, eleventh, thirteenth, eighteenth, and nineteenth.

The first assignment of error is, that the court erred on the trial of the first issue, in giving the first and third instructions asked for by the plaintiff below. In the first of which the court instructed the jury that the declarations and admissions of a party are legal and sufficient evidence against him, but not in his favor. This instruction is erroneous in charging as to the sufficiency of the evidence. The sufficiency of the evidence is a matter peculiarly within the province of the jury to determine. It is also erroneous in charging, without qualification, that the declarations and admissions of a party are not evidence in his favor. This instruction undoubtedly lays down the general rule correctly. But there are well-recognized exceptions to this general rule, and the case at bar comes within one of these exceptions. An acknowledged exception to the rule which prohibits a party from producing his own declarations in his favor is, where such declarations are necessary to explain an act which takes its character from the design and intention of the party who does it: *Cross v. Black*, 9 Gill & J. 198; *Baptiste v. De Volunbrun*, 5 Har. & J. 86.

The declarations and acts of a party to a suit when they make part of the *res gestæ* constitute another exception to the general rule above alluded to, and are legal and competent evidence for him. There is no error in giving the third instruction.

The second assignment of error is, that the court erred in refusing to give the ninth instruction asked for by the defendant below, which is as follows: "As illustrative of the issue in this case, the jury should consider all the contemporaneous

acts and conduct of the defendant as indicating his intention in reference to the removal from the state." This instruction propounds the law correctly as applicable to this case, and the court erred in refusing to give it.

We will consider together the seventh, tenth, and thirteenth assignments of error, as they are substantially the same, to wit: "That the court below erred in deciding that no evidence should be admitted on the part of the defendant to prove any declarations or statements made by him at any time before the attachments were sued out, unless those declarations were part of conversations called out by the attaching creditor." In thus ruling the court manifestly erred.

Where the intentions of a party are sought to be established, he may show what were his intentions, by introducing in evidence his own acts and declarations made *ante litem motam*, or at a time not suspicious, when he could have no reasonable motive to misstate facts or misrepresent the truth: *Gardner v. O'Connell*, 5 La. Ann. 353.

In the case of *Offut v. Edwards*, 9 Rob. (La.) 90, the court decided that where an attachment has been obtained, evidence will be admissible on the part of the defendant to prove his conversations and declarations made out of the presence of the plaintiff previous to his leaving the state, and a short time before the attachment was sued out, with a view to show that his removal from the state was not intended to be permanent. And again, in the case of *Thompson v. Stewart*, 5 Litt. 5, the court decided that the declarations of a party made before an adverse possession was taken, as to his intention in removing from the premises, may be given in evidence in his favor, on the traverse of an inquisition of forcible entry.

The first issue was upon the truth of the alleged cause for which the attachment in this case was sued out, and not whether the attachment was wrongfully sued out; for that would depend upon the result of the trial of that issue, and the finding of the jury for the defendant would be virtually a finding under the statute that the attachment was wrongfully sued out.

Whether the plaintiff in error was about to remove himself out of this state at the time of suing out the attachment, is a question of intention which can be established only by declarations, acts, and circumstances. His intention can be known only to himself, except so far as it is communicated by his declarations. And these declarations, made about that time,

and before the controversy arose, are legal evidence for him of his intention of removing from or remaining in the state: *Russell v. Frisbie*, 19 Conn. 205.

The declarations offered in evidence on the part of the plaintiff in error were made by him about the time that he made the declaration upon which the attachment was taken out; and his acts with reference to procuring hands and making preparations for planting in Hinds were done but a short time before or after that declaration was made, and at a time when there was no controversy or *lis pendens* between these parties, and were, therefore, competent evidence for the plaintiff in error, and should have been permitted to go to the jury: *Kolb v. Whitely*, 3 Gill & J. 198; *Kilburn v. Bennett*, 3 Met. 199.

The eleventh assignment of error is, that the court below erred in deciding that the plaintiff in error could not give in evidence any acts or conduct of his occurring after the attachment proceedings were commenced. There is no error in this ruling of the court.

The declarations of a defendant in an attachment made after the attachment was sued out are inadmissible to explain away the effect of previous declarations: *Tucker v. Frederick*, 28 Mo. 574 [75 Am. Dec. 139]. The same reason that renders declarations of the defendant, made after the attachment is sued out, incompetent evidence for him will apply to his subsequent acts and conduct, and render them inadmissible as evidence for him.

The eighteenth assignment of error is not well taken. The manner of swearing the witnesses, and the commissioner's certificate to the depositions, are a substantial compliance with the law. We therefore think there was no error in allowing the depositions of Graham and Hero to be read in evidence to the jury.

The nineteenth assignment of error is, that the court erred in permitting the note of Adams and Austin to R. Clardy, and indorsed by him and defendant Baker, for \$1,075, to be read to the jury, so as to bind Baker in the absence of all proof of protest and notice.

This presents the question of the legal effect of Baker's indorsement on said note, which is in the following words: "I assign the within to Samuel D. Kelly, for value received, and bind myself to paying it promptly after maturity, if not paid by the drawers at maturity."

This indorsement makes Baker a guarantor of the payment of the note. It is an absolute engagement that the makers should pay the note when due, or that he would pay it himself. The plaintiff below was not bound to prove demand of payment of the makers and notice of non-payment, as in case of an ordinary indorsement: *Thrasher v. Loring*, 2 Smedes & M. 139; *Matthews v. Chrisman*, 12 Id. 595 [51 Am. Dec. 124].

There is a manifest distinction between an absolute guaranty of a promissory note, or a sum ascertained and certain, and a letter of credit, with a guaranty which requires acceptance and notice. Upon the failure of the makers of the note to pay it at maturity, the liability of the guarantor becomes fixed, and the holder has a right to sue him at once upon the guaranty, and recover the amount due upon the note, without proof of demand and notice, as in ordinary cases of indorsement: *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]; *Heaton v. Hulbert*, 3 Scam. 491; *Klein v. Currier*, 14 Ill. 241; *Hance v. Miller*, 21 Id. 638.

When the matter alleged lies peculiarly in the knowledge of the plaintiff, he must aver and prove that the defendant had notice; but when it lies equally in the knowledge of the defendant, such averment and proof are unnecessary: *Lent v. Padelford*, 10 Mass. 230 [6 Am. Dec. 119]; *Douglass v. Howland*, 24 Wend. 35; *Jones v. Train*, 11 Vt. 444; 2 Am. Lead. Cas. 54, 55, 94. The case at bar comes within the latter branch of the rule.

When the guaranty is that the debt shall be paid by a particular day, the guarantor's obligation is not considered secondary or collateral, but primary and positive, and no demand and notice are necessary: *Lane v. Le Villian*, 4 Ark. 76 [37 Am. Dec. 769]; *Lee v. Dick*, 10 Pet. 496. And where a guaranty is absolute in its terms, and definite as to its amount and extent, no notice to the guarantor is necessary: *Carson v. Hill*, 1 McMull. 76; *Williams v. Springs*, 7 Ired. 384.

Where one contracts in the form of a guaranty upon the back of a promissory note, he cannot set up in defense the want of demand and notice, nor the mere neglect of the holder to sue the maker: *Brown v. Curtis*, 2 N. Y. 225; *Matthews v. Chrisman*, 12 Smedes & M. 595 [51 Am. Dec. 124].

We have reserved for the last the consideration of the third assignment of error, which is, that the court erred in overruling the motion for a new trial of the first issue, made by the defendant below.

Upon the whole, for the reason given in this opinion, we think the court erred in refusing to grant a new trial of the first issue.

The judgment will therefore be reversed, the cause remanded, and a *venire de novo* awarded.

WHEN DECLARATIONS OF PARTY ARE ADMISSIBLE IN HIS OWN FAVOR. — The whole rule as to the admissibility of such declarations may be stated in a few words as follows: Declarations of a party are admissible as evidence in his favor when they form part of the *res gestæ*, or where such declarations are necessary to explain an act which takes its character from the design and intention of the party who does it. This is the rule stated in the principal case, and in *Young v. Power*, 41 Miss. 197. It is not proposed to discuss what and when declarations form part of the *res gestæ*. This topic will be fully treated in a note to *People v. Vernon*, to be published in volume 95 Am. Dec. Examples will be given, however, of declarations of all kinds which have been admitted in favor of the party making them.

Declarations by a party to a contract soon after its execution have been held admissible as showing the state of mind of the party at the time: *McRae v. Malloy*, 93 N. C. 154. So of declarations of a party made at the time of receiving money, and to the effect that more was due: *Dillard v. Scruggs*, 36 Ala. 670. Declarations of a married woman made at the time of acknowledgment of a deed, that she did it under protest, are admissible: *Louden v. Blythe*, 16 Pa. St. 532; S. C., 55 Am. Dec. 527. On a question of domicile, declarations of intent which accompanied the acts of starting or journeying are admissible: *The Venus*, 8 Cranch, 278; *Richmond v. Thomaston*, 38 Me. 232; *Cornville v. Brighton*, 39 Id. 333; *Russell v. Frisbie*, 19 Conn. 205. In an action by a bailor for loss of articles by the bailee, the latter's declarations contemporaneous with the loss are admissible in his favor to show the nature of the loss: *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Beardslee v. Richardson*, 11 Wend. 25.

Declarations of a person taking possession of property are admissible to show the nature and limitations of his possession: *Hall v. Young*, 37 N. H. 134; *Blood v. Rideout*, 13 Met. 237; *Happy v. Mosher*, 47 Barb. 501. The declarations of a vendor in possession of land as to the claim under which he holds are admissible in his favor: *Osgood v. Eaton*, 63 N. H. 355; *McSween v. McCown*, 23 S. C. 342. Where a claim of ownership can be proved only by the claimant's words and acts, they are admissible: *Phipps v. Pierce*, 94 N. C. 514. To prove adverse possession, declarations by the party in possession in favor of his own title are admissible: *Huggins v. Huggins*, 71 Ga. 66; and see *Thompson v. Stewart*, 5 Litt. 5. On the question whether a deed was intended as a mortgage, the fact of the grantor's remaining in possession, and his declarations in connection therewith, are admissible in his favor: *Creighton v. Hoppis*, 99 Ind. 369. Declarations upon taking possession of land as to the boundaries may be admitted: *Potts v. Everhart*, 26 Pa. St. 496.

Where part of a declaration or conversation is admitted against a party, he may show the rest of it to explain its effect. This topic is fully discussed in a note to *Rouse v. Whited*, 82 Am. Dec. 342-345.

Declarations, conduct, and exclamations of passengers on a railroad at the time of an accident are admissible as part of the *res gestæ*, to justify the conduct of the party injured: *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; S. C., 63 Am. Dec. 323.

Exclamations of pain are admissible to prove the existence of pain: *Insurance Co. v. Mosely*, 8 Wall. 397; *Sanders v. Reister*, 1 Dak. 151; *Bacon v. Charlton*, 7 Cush. 581; *Hatch v. Fuller*, 131 Mass. 574; *Ednot v. Van Buren*, 33 Mich. 49; *Grand Rapids etc. R. R. Co. v. Huntley*, 38 Id. 537; *Towle v. Blake*, 43 N. H. 92; *Taylor v. Grand Trunk R. R. Co.*, 43 Id. 304; *State v. Howard*, 32 Vt. 380; *Rogers v. Crain*, 30 Tex. 284. Groans and gestures at the time of an injury are admissible to show pain and suffering, and even the nature of the injury: *Bacon v. Charlton*, 7 Cush. 581; *Hyatt v. Adams*, 16 Mich. 180. So declarations of pain or symptoms of a malady are admissible to show a party's physical condition and the nature of his illness: *State v. Mackey*, 12 Or. 154; *Fay v. Harlan*, 128 Mass. 244; *Carthage T. Co. v. Andrews*, 102 Ind. 138; and see the cases above cited; but this refers only to present symptoms at the time of making the statement, and declarations as to past symptoms and effects of a malady are held inadmissible under this rule: *Rossa v. Boston Loan Co.*, 132 Mass. 439; *Grand Rapids R. R. v. Huntley*, 38 Mich. 537; *Merkel v. Bennington*, 58 Id. 156; S. C., 55 Am. Rep. 666; *Denton v. State*, 1 Swan, 279.

Declarations of one on trial for a crime, if part of the *res gestæ*, are admissible in his favor: *Phillips v. State*, 19 Tex. App. 158. Declarations explanatory of how the party's hands became bloody are admissible: *Scrugg v. State*, 8 Smedes & M. 722.

Declarations of the prosecutrix soon after the commission of the crime of rape are admissible in evidence: See the cases collected in the extended note to *Smith v. State*, 80 Am. Dec. 371. So as to declarations made immediately after an indecent assault: *Gardner v. Kellogg*, 23 Minn. 463.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

HENDERSON v. BONDURANT.

[89 MISSOURI, 862.]

PARTY TAKING NOTE SIGNED AND INDORSED IN BLANK, with blanks in the body of the note for insertion of the amount, but with figures in the corner specifying a certain sum, is bound to take notice that the note cannot be filled for a larger sum than that specified in the corner, and is put on inquiry as to the authority of the party offering the note to fill the blank with a larger sum.

ACTION upon a promissory note. The opinion states the facts.

Adams and Shackelford, for the plaintiff in error.

J. V. Turner, for the defendant in error.

By Court, **WAGNER, J.** Plaintiff brought his suit against the defendants on a note for the sum of \$250. The note is payable to plaintiff, signed by Charles P. Bondurant and Edward A. Carter as makers, and indorsed in blank on the back by the defendant William T. Gilliam. The suit is instituted against all the defendants as makers of the note.

Bondurant and Carter filed no answer, and judgment by default was taken against them. The defendant Gilliam filed an answer, in which he substantially states that Bondurant, who is the principal, brought to him a blank piece of paper, signed by Bondurant and Carter on the lower right-hand corner, and with the figures \$200 on the upper left-hand corner; that Bondurant procured his indorsement on the back of the paper for the purpose of negotiating the same in one of the

banks at Glasgow; that the figures \$200, on the left-hand corner, indicated that the same was to be negotiated for \$200, and the note filled up for that amount, he (Gilliam) to occupy the position of indorser; that he had no interest in the note or the proceeds, but only indorsed the same for the accommodation of Bondurant; that Bondurant took the blank note thus signed and indorsed, with the figures at the top, to Glasgow, and tried to negotiate the same in the banks at Glasgow, but did not succeed; that Bondurant was owing a precedent debt to the plaintiff for about \$300, and having failed to obtain a discount in the banks, he took the blank note with the figures \$200 on the same, and with defendant's indorsement on the back, and proposed to deliver the note to plaintiff in payment of the precedent debt to the extent the figures indicated, and to pay the balance in money, but that on examination of the amount due plaintiff from Bondurant it was found that Bondurant had not enough money to pay the balance, and that it was arranged between plaintiff and Bondurant to make the note for \$250 instead of \$200, and that Bondurant himself (or the plaintiff with his consent) altered the figures \$200 and made them \$250; that defendant was not present at the time, and was never notified of the alteration and never consented to the same; and that Bondurant at the time of the negotiation with plaintiff informed him that he had obtained the indorsement of defendant on the paper to be negotiated in the banks, or one of them, for \$200, but that he did not succeed.

Upon the trial of the cause before the court without a jury, Bondurant was sworn as a witness for the defendant, and testified to the facts, substantially as set out in the answer, as to the manner of procuring the defendant's indorsement, and the mode in which the note was to be negotiated and discounted. He also stated that failing to get the note discounted in bank, he delivered the same to plaintiff in payment of \$250, and took up a note for a previous debt for \$300, paying the balance of \$50 in money; that the figures \$200 were in his handwriting, and were on the note at the time he was negotiating it with the plaintiff; did not recollect who altered the figures from \$200 to \$250, but thought it was done by his consent; did not remember who filled up the written portion of the note at \$250, nor that he told plaintiff the understanding concerning the note between him and defendant when he received defendant's indorsement; defendant was not present when the alteration was made.

Defendant then proved that it was the custom at the banks for blank notes to be presented for discount with the signature of the parties at the right-hand corner, and indorsed by others on the back, and with the figures for the amount for which the discount is wanted on the left-hand corner of the face; that the figures on the face indicate the amount for which the note is to be filled up, and that the indorsement of the signature on the back of the note indicates that the party signing on the back is to be bound as indorser, and the note is filled up to him as payee.

The court gave certain declarations of law, which it is unnecessary here to notice, and then found for the plaintiff.

Judge Story says: "It is very common for persons to sign their names in blank to a paper, for the purpose of having a promissory note written over it; and in such a case the note, when written, will bind the party, if done by a person properly authorized, in the same manner and to the same extent and from the same time as if it had been originally filled up before the signature was made": Story on Promissory Notes. sec. 10. Where a person holds a negotiable note, *bona fide*, for value, an indorser who indorsed it in blank will not be allowed to set up as a defense that he indorsed the note with the understanding that it was afterwards to be filled by the maker with a certain amount, and that the maker filled the note with a much larger amount than was agreed upon: *Tumilty v. The Bank*, 13 Mo. 276; *Farmers' Bank v. Garten*, 34 Id. 119.

In the case of *Russell v. Langstaff*, Doug. 514, the plaintiff, when he took the notes, knew that they were blank at the time of the indorsement, and were afterwards filled up by Galley, the maker; Lord Mansfield says: "The indorsement on the blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were irregular."

But this rule only applies where the transaction has been carried on in good faith, and the holder or indorsee has received the paper for value, and has not been guilty of laches or negligence. If he is informed of the breach of trust or confidence committed by the maker, or there are circumstances of suspicion which ought to place a prudent man on his guard, or induce him to make inquiry, he will not be protected by invoking the above principle. Thus, in the *Mahaiwe Bank v. Douglass*, 31 Conn. 170, the defendant indorsed a blank bill of

exchange, from which the holder, who had previously signed it as drawer, erased most of the former part, and then wrote over his own name a negotiable note payable to the defendant's order, and got it discounted as an indorsed negotiable note at the Mahaiwe Bank, which was the plaintiff in the case, and the court held that the bank was bound, at its own risk, to scrutinize it, and to ascertain whether the defendant authorized such a change. There was enough, it was decided, to put the bank on its guard; and if it trusted to the representations of the holder, it was at its own risk.

Lovett v. Adams, 3 Wend. 380, decides that where a bond was executed by nine persons as obligors upon certain terms and conditions, and subsequently delivered by five of the obligors without the knowledge or consent of the remaining four, upon terms and conditions different from those originally stipulated, that it was not obligatory upon the latter. And in *Hall v. Bank of the Commonwealth*, 5 Dana, 258 [30 Am. Dec. 685], it was held that when the note was delivered to the plaintiff with the sum and date placed on the top or margin, with the expectation or intention that he would insert the same sum and date in the body, but that he tore them off and inserted a different sum and date, without authority, the plaintiff could not recover.

In the case here, the indorsement was in blank, but the amount for which the note was expected and intended to be filled up was in the corner and margin of the note; that was an authority for filling it up for that sum, and no more. The plaintiff, when he took the note and had it filled up for a different amount, was apprised of this fact, or at least had such knowledge as was sufficient to put him on his guard, and make it necessary that he should make further inquiry; and when he persisted in taking it with the facts apparent on the face of the writing, he acted at his own risk.

The law was not properly declared in the court below, and its judgment is reversed and the cause remanded.

The other judges concurred.

NOTE WITH BLANK IN BODY FOR INSERTION OF AMOUNT may be filled with amount indicated in margin: *Williamson v. Smith*, 78 Am. Dec. 478, and note.

MERCHANTS' BANK v. HARRISON.

[39 MISSOURI, 433.]

ACKNOWLEDGMENT IS SUFFICIENT TO RENDER DEED ADMISSIBLE IN EVIDENCE, where notary, in his certificate to a deed conveying land in Livingston County, describes himself as a notary public within and for the county of Livingston, though he appends to his signature the words "Notary Public Howard County."

IF BOTH PARTIES IN EJECTMENT CLAIM UNDER COMMON TITLE, it is *prima facie* sufficient to show a derivative title from the common grantor without proving his title.

LEGAL EXISTENCE OF CORPORATION IS ESTABLISHED PRIMA FACIE by proof of the charter of the corporation, and of the exercise of the powers thereby conferred.

BANKS MAY LAWFULLY PURCHASE REAL ESTATE IN MISSOURI, under the banking act of 1856-57, if the purchase is made in good faith for the purpose of securing a debt due to the bank.

SHERIFF WHO LEVIES EXECUTION UPON REAL ESTATE MERELY BY INDORSING LEVY upon his writ, and subsequently turns over the writ, with his other unexecuted process, to his successor in office, cannot afterwards proceed to sell and convey the lands of the defendant, and his deed will not convey title.

RECITALS IN SHERIFF'S DEED CONVEYING LANDS OF JUDGMENT DEBTOR are sufficient evidence of the existence of the judgment without production of the judgment record.

EJECTMENT. The opinion states the facts.

Vories and Vories, for the appellants.

Hall and Oliver, for the respondent.

By Court, HOLMES, J. This was an action of ejectment for the possession of a tract of land lying in the county of Livingston. The petition alleged that the plaintiff was a corporation under the laws of the state. The answer denies the material allegations of the petition. Both parties claimed title under Jasper N. Bell, the common grantor. It was amply proved that Jasper N. Bell, prior to any conveyance to either party, had had possession of the land claiming title by deed, and for nearly ten years at least. Documentary evidence was offered by the plaintiff to show a complete chain of title from the United States to Jasper N. Bell, but one of the deeds was excluded on the ground of a defective acknowledgment. The notary public who took the acknowledgment described himself in the body of the acknowledgment as a notary public within and for the county of Livingston, but appended to his signature his official character in these words: "Notary Public Howard County." We are inclined to think that the deed

should have been admitted; but being excluded, there was still evidence enough to show a possession of the land by one claiming title by deed, and this was sufficient *prima facie* evidence of title to entitle the plaintiff to recover until a prior or better title should be shown. And further, as both parties claimed title under a common grantor, the title of the ancestor was admitted, and could not be denied in this case.

“When both parties claim under the same third person, it is *prima facie* sufficient to prove a derivation of title from him without proving his title”: 2 Greenl. Ev., sec. 307.

The answer denied that the plaintiff was a corporation, and this fact was put in issue. To support this issue, the plaintiff read in evidence the act of the legislature incorporating the bank, and prescribing the mode in which it should be organized, and there was ample evidence tending to show that the bank had gone into operation under the act, and to show acts of user. The acts of user which were proved were *prima facie* evidence under the charter: Angell on Corporations, sec. 635. No evidence was offered by the defendant to the contrary. We think it was sufficiently proved that the plaintiff was a corporation.

It appeared in evidence that this land was purchased by the bank by way of securing the payment of a debt due from Jasper N. Bell amounting to about two thousand four hundred dollars; that the land was worth some nine thousand five hundred dollars, but was subject to the prior lien of a deed of trust; and that the balance of the purchase-money, amounting to about seven thousand dollars, was paid to the holder of the deed of trust to discharge this prior encumbrance, and the land was purchased by the bank for the sole purpose of securing the payment of the debt.

It was objected that this purchase was not authorized by the charter of the bank, and that the deed was therefore null and void. There was no other prohibition on the bank from the purchase of real estate than that contained in the twenty-sixth section of the act to regulate banking institutions (Laws 1856-57, p. 21), which provides that “each bank may hold such real estate as may be required for the convenience and accommodation of said bank and branches, and such as may be conveyed to the same in payment of debts previously contracted in good faith, and without a view to the purchase thereof; and also such as may be purchased at sales upon judgments and decrees in favor of the bank, when it shall be

purchased in order to secure the debt. But the bank shall as soon as practicable, under the direction of the board, dispose of all real estate held by it which is not necessary to the transaction of its business."

It is insisted that this purchase was made on speculation, and not necessarily to secure the payment of a debt previously contracted in good faith and without a view to the purchase thereof. The real value of the property was what it was worth over and above the prior encumbrance, and this does not appear to have been much, if any, more than the amount of the debt due the bank. We do not see that there was any ground for saying that the purchase was not made in good faith and for the purpose of securing the payment of the debt, and we think it came clearly within the power given by the charter.

The defendant claims under a sheriff's deed, upon a sale of this land by the sheriff of the county of Livingston under a judgment and execution against Jasper N. Bell. The deed to the plaintiff was dated and recorded on the 12th of May, 1862; the judgment was rendered on the second day of December, 1861, in the court of common pleas of Buchanan County; and the execution was issued to the sheriff of Livingston County on the tenth day of December, 1861, and was by him levied on this land in no other way than by indorsement of the levy, with a description of the property, on the execution in his office, on the twentieth day of December following. Before proceeding further with the levy, the sheriff, in May, 1862, resigned his office and turned over his unexecuted process, this execution included, to the coroner of the county. The coroner proceeded to make other levies under the execution on other property, both real and personal, and made return thereon of his execution of these levies. It further appears by a return made subsequently on the same execution, that it had somehow come again into the hands of the former sheriff, who indorsed a return thereon that he had on the ninth day of July, 1863, sold the lands described in the accompanying levy at the court-house door of Livingston County to the Bank of the State of Missouri, for the sum of \$12.50. This return does not state that the sale was made during the session of any court. It is insisted by the defendants that the sheriff, having made his indorsement of a levy before his resignation, had power and authority under the statute to go on and complete the levy by an advertisement and sale, after his resignation, and notwithstanding that he

having taken place. In such case the deed is to be considered as relating to the date of the sale and certificate, and as vesting the full legal title in the insured at a date anterior to that of the policy. He is to be regarded as absolute owner at that date and at the time of the loss.

THE opinion states the facts.

Sharp and Broadhead, for the appellant.

Glover and Shepley, and Currier, for the respondents.

By Court, HOLMES, J. It appears that the property insured was sold on the second day of August, 1862, under a decree of foreclosure of a mortgage, and that a certificate of purchase of that date was delivered by the special commissioner to the purchaser, who assigned it to the plaintiffs under the laws of Illinois, which allowed fifteen months for redemption before the final deed was to be executed; that the plaintiffs, as owners of the property, effected this insurance on the fifth day of September, 1863; that the loss occurred on the ninth day of October following, and that on the third day of December, 1863, the special commissioner executed and delivered to the plaintiffs, as assignees of the certificate of purchase, his final deed conveying the property in fee, no redemption having taken place.

The policy contained a clause to this effect: "That if the interest in the property to be insured be a leasehold, trustee, mortgagee, or reversionary interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void."

No written application was made before the policy was issued. The verbal representation was simply to the effect that the insured were the owners of the property.

The ground of objection is, that they were not the absolute owners in fee-simple title at the date of the policy or of the loss, and that there was a breach of warranty in this respect, or a misrepresentation of the interest of the insured, that under this clause avoided the policy.

The object and intent of this clause would seem to have been, that if the interest of the insured in the property was only that of a lessee, trustee, mortgagee, or other estate less than a freehold, or carved out of the fee-simple, the same should be particularly stated and described in the policy. As to the absolute or full ownership of the property, whether it

were by virtue of a legal or equitable title, it would seem to have been left to the general law on the subject of the interest of the insured. If he were the owner at the time of the loss, that would be enough; if he were not the owner, there could be no recovery on the policy. Under a somewhat similar claim, it has been held that the "absolute interest" referred rather to the actual ownership than to the nature of the title, and meant a vested interest of which the owner could not be deprived without his consent, "in contradistinction to a contingent or conditional interest": *Hough v. City Fire Ins. Co.*, 29 Conn. 10 [76 Am. Dec. 581]. An equitable title that would be protected by a court of equity as such may be an ownership as absolute as the legal title. The clause does not concern the particular character of the owner's title. This title was subject, it is true, to be divested by redemption under the statute, and may be said to have been so far conditional, or rather defeasible. We are inclined to think such a contingency did not come within the special intent of this clause, which rather related to lesser estates, or interests, of the class particularly enumerated; nor do we see any reason for a different construction; for if the title had failed by reason of a redemption, there could have been no recovery on the policy even without this clause; not failing, the loss would fall on the plaintiffs, and they would be justly entitled to indemnity. The indefeasibility of the title is not the criterion of an insurable interest; an expectancy coupled with a present existing title is enough: *Stirling v. Vaughan*, 11 East, 618; 1 Arnould on Insurance, 230; Hildyard on Insurance, 66.

But whatever doubt there may have been on this point, we think the whole controversy is closed by the operation of the fiction of relation, whereby, for all the purposes of this insurance, the commissioner's deed is to be considered as relating back to the date of the sale and certificate, and as vesting the full legal title in the plaintiffs as of a date anterior to the date of the policy; and that they are to be regarded as having been the absolute owners of the title at that date and at the time of the loss: *Crowley v. Wallace*, 12 Mo. 145; *Jackson v. McCall*, 3 Cow. 75 [6 Am. Dec. 343]; *Boyd v. Longworth*, 11 Ohio, 235. We see no reason why this principle should not be applied here. The certificate filed was equivalent to a deed taken and recorded, so far as the purchaser's security from any intervening claims; but the right of redemption was concerned, and the deed operated by way of execution of a stat-

ute power to pass the absolute title from the date of the sale by relation: 4 Kent's Com., 7th ed., 456-460.

It is consistent with the maxim, *Ut res magis valeat quam pereat*. It is in furtherance of justice. It does not interfere with the rights of a stranger, nor injuriously affect the intervening rights of any third party. It does not take away any defense which the defendants would be entitled to make by virtue of any stipulation in the policy. The interest of the assured was not of the character of any of these lesser estates, which were required to be disclosed and particularly described in the policy. It merely avoids a technical objection to the nature of the plaintiff's title. It is a fiction of law which may be properly applied in support of justice, and to obviate a failure of the contract on a purely technical ground.

No injustice is done to the defendants. It was not a matter of any importance to them that this title was subject to be divested by a possible redemption; for if there had been a redemption before the loss, there would have been no title, no insurable interest, in the plaintiffs, and of course no possible right to recover. But there was no redemption. The defeasible title became an absolute one, and by relation was fully vested before the loss, and all substantial ground of objection on the part of the defendants entirely disappears.

Judgment affirmed.

The other judges concur.

EQUITABLE TITLE IN PROPERTY IS ABSOLUTE INTEREST, and is insurable. Such title, with a right to the legal title upon performance of certain conditions, a part of which have been performed, is an absolute interest: *Hough v. City Fire Ins. Co.*, 76 Am. Dec. 581, a case very much like the principal case; see also *McDonald v. Black*, 55 Id. 448; *Strong v. Manufacturers' Ins. Co.*, 20 Id. 507.

IF ONE HAS EQUITABLE TITLE IN PROPERTY, and so states in the policy, he has an insurable interest: *Williams v. Roger Williams Ins. Co.*, 107 Mass. 380; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 268. If he is the owner at the time of the loss, it is sufficient: *Id.*, both citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Mers v. Franklin Ins. Co.*, 68 Mo. 130, where it is held that a leasehold, with an option to redeem without consideration, is not an insurable interest.

TESSON v. ATLANTIC MUTUAL INSURANCE COMPANY.

[40 MISSOURI, 83.]

EQUITY MAY REFORM POLICY OF INSURANCE or other written contract upon parol evidence, when the contract really made by both parties has not been correctly incorporated into the instrument through accident or mistake in framing it; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be. The court cannot supply an agreement that was never made.

WHEN THERE IS SUCH VARIANCE IN DESCRIPTION OF PROPERTY in a policy of insurance as amounts to a breach of warranty in any material respect, the result is that the policy is void; and it is not enough that an agent intended to effect an insurance on the property by whatever description might be correct.

WHETHER THERE IS SUCH VARIANCE BETWEEN DESCRIPTION of the subject insured as contained in the policy and the actual buildings as shown by the evidence, or whether there is a misrepresentation of any material fact, or breach of the warranty created by embodying the representations made in the policy, such as would preclude a recovery on the policy, are questions of fact to be determined by a jury.

CONTRACT OF INSURANCE IS TO BE CONSTRUED with reference to the subject-matter, and with a view to the object and intention of the parties as the same may be gathered from the instrument; and parol evidence is admissible, not to contradict or change the terms of the instrument, but to develop and explain its true meaning.

CONSTRUCTION OF LANGUAGE IN POLICY OF INSURANCE is to be determined, as in other contracts, by usage and common acceptance; and the stipulations, though being of the character of warranties and conditions, are to be reasonably construed with reference to the whole subject-matter, and not captiously or literally. Parol evidence is admissible for this purpose, and the question is one for the jury to determine.

THE opinion states the facts.

Hill and Jewett, for the appellant

Glover and Shepley, and Bakewell and Farish, for the respondent.

By Court, **HOLMES, J.** This is a petition in the nature of a bill in equity to reform a policy by correcting a mistake alleged to have been made in the framing of the instrument, in order to make it conform to the real contract of the parties, and for relief upon the policy so reformed. The court below granted the relief prayed, and the case came up by appeal.

It appears that the agent of the insured made a written application to the company in these words: "\$5,000 fire insurance wanted for six months on a three or four story brick distillery and machinery, not running, no fire about it, situated

entirely detached (nearest building being an office, say 100 yards), on the bank of the Mackinaw River, in the town of Forneyville, Woodford County, Illinois, valued at \$32,000. Privilege of \$5,000 other insurance. Gable end is frame. December 16, 1858. Ed. P. Tesson, per L. E. Suber, attorney in fact. Brought a letter from Tesson,—no plat.”

The policy contained this description: “On his three or four story brick distillery building and machinery in the same, not running, no fire in or about it, situated entirely detached on the banks of the Mackinaw River, in the town of Forneyville, Woodford County, Illinois; valued at \$32,000; other insurance on same, \$5,000.”

The evidence shows that the agent had at the time of the application no more exact information concerning the true situation and description of the buildings to be insured than that which he communicated to the company; that the company had no other knowledge of the premises than that which was communicated by the agent; that certain plats were handed to a person (by the witness stated to be the secretary) at the insurance office, soon after the application was made, and before the policy was delivered, which (as stated by the secretary) never came to his knowledge, nor to that of the directors, until after the loss, and formed no part of the written application as made; and that the policy came into the hands of the assured soon after it was issued, but that no mistake had been discovered or notified to the company until after the loss.

It does not appear that these plats furnished any evidence that any contract or agreement for a policy had been made and agreed on between the parties different in its terms from that which the policy contained. So far as appears from any explicit testimony, the policy conformed in all essential particulars with the written application, except in the omission of the words “gable end is frame.” No stress is laid upon this difference.

The evidence further shows that the distillery as a whole stood detached from any other buildings of adjoining proprietors; that the main part of the building was three stories high, two stories of brick and the third story of wood; that there were boilers set in brick-work outside of the building, and covered with a shed-roof on posts and supported against the wall, with an engine in the cellar; and that there was a wooden addition to the main building one story (eight or nine feet) high,

and some sixty feet long and thirty wide, used in connection with the distillery and as a part of it.

The plaintiff proceeds here upon the supposition that he would not be entitled to recover on the policy at law. He assumes that it is necessary to have the policy reformed, on the ground of a mistake made in not framing the instrument according to the agreement that was entered into between the parties, and that the contract as understood by both parties was not correctly embodied in the policy.

A court of equity has jurisdiction to reform a policy of insurance or other written contract upon parol evidence, when the agreement really made by both parties has not been correctly incorporated into the instrument through accident or mistake in the framing of it; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties, as to what the contract was intended to be, and upon testimony entirely exact and satisfactory; and it must appear that the mistake consisted in not drawing up the instrument according to the agreement that was made: *Andrews v. Essex Fire and Marine Ins. Co.*, 2 Mason, 6; 1 Story's Eq. Jur., secs. 157-161; Adams's Equity, 171; 1 Phillips on Insurance, 42; 1 Arnould on Insurance, 51; *Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. 4; *Lyman v. United Ins. Co.*, 2 Johns. Ch. 630; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; 1 Duer on Insurance, 71. The court cannot supply an agreement that was never made: *Graves v. Boston Ins. Co.*, 2 Cranch, 419.

The record here does not present such a case. There is no explicit and satisfactory evidence that any other agreement was made between the parties than that which was embodied in the policy. The policy conforms substantially to the written application upon which it was framed. It is not clearly proved that the plats ever formed a part of the application, nor does it appear that they furnish any evidence that a different contract was made. It is evident enough that the object of the agent was to get an insurance effected on this property; but he was not himself informed of its situation and character so that he could give a true and correct description. The written application was drawn up on such as he had at the time, and the policy appears to have been framed according to the application. No other agreement was made. It is plain that if the description in the policy be not sufficiently correct, the reason was that the agent was not furnished with sufficient

information to enable him to describe the premises more accurately. It turns out after a loss that there was such a misdescription of the situation and character of the buildings that the plaintiff apprehends that he would fail to recover in an action at law, for the reason that the policy might not cover the subject that he intended to get insured. The company has made no other contract than that contained in the policy. If there be such a variance as would amount to a breach of warranty in any material respect, the result would simply be that the party, through a want of proper diligence and information, has failed to make an available contract of insurance: *Plahto v. Merchants' and Manufacturers' Ins. Co.*, 38 Mo. 248. It is not enough that the agent intended to effect an insurance on this property by whatever description might be correct: *Graves v. Boston Ins. Co.*, 2 Cranch, 419.

The case made simply presents this question, whether there was such a variance between the description of the subject insured as contained in the policy and the actual buildings as shown by the evidence as would preclude the plaintiff from recovering on the policy in an action at law. In a general sense, the buildings appear to have stood detached from other buildings of adjoining proprietors. The main building was of brick, the third story only being of wood, and there was a wooden addition used as a part of the distillery, one story high, and the boilers were set in brick outside, with a shed-roof of wood. Now, whether or not this distillery building was the identical subject insured in this policy, or whether there was a misrepresentation of any material fact, or a breach of the warranty created by embodying the representations made in the policy, would be matters of fact for a jury to determine. The contract is to be construed with reference to the subject-matter, and with a view to the object and intention of the parties, as the same may be gathered from the instrument. Parol evidence is admissible, not to contradict or change the terms of the instrument, but to develop and explain its true meaning. It is admissible to show the true situation and character of these buildings as the subject-matter referred to in the policy, and also upon the question of a material variation between the representations made and incorporated into the policy and the actual facts as they were, and upon the matter of a material difference in the risk.

The construction of the language of the policy is to be determined, as in other contracts, by usage and common accep-

tation; and the stipulations, though being of a character of warranties and conditions, are to be reasonably construed with reference to the whole subject-matter, and not captiously or literally: 1 Phillips on Insurance, secs. 766, 872.

Where a policy described the building as "a frame house filled in with brick," which amounted to a warranty, and the proof showed a house filled in with brick to the eaves only (the gables being of wood), and only in front and rear, the two sides abutting against brick walls, it was left to the jury to say whether, by the usage and custom of insurers and insured, such a house answered the description in the policy: *Fowler v. Aetna Fire Ins. Co.*, 7 Wend. 270; 1 Phillips on Insurance, sec. 873. So when the representation and the policy described the building as "a stone mill four stories high and covered with wood," and the evidence showed a building of stone to the eaves only, the gables and roof being of wood, under a policy which contained a rule that the insurance should be void if the buildings were described in the policy otherwise than they really were, "so as the same be charged at a lower premium than would otherwise be demanded," it was left to the jury to decide whether the risk were materially different, and whether from all the facts given in evidence, in order to verify the description given in the policy, it was necessary that the whole walls from the foundation to the roof should be stone, and they were instructed that no variation not fraudulently made would vitiate the policy, unless by reason thereof the insurance was made at a lower premium than would otherwise have been demanded.

The decision in the supreme court of the United States was placed on the ground that the rule had provided for the case; but the question of material difference in the risk was held to be a matter of fact for the jury to decide, and no opinion was given upon the instruction, which also left it to the jury to determine whether the property insured was truly described. In *Houghton v. Manufacturers' Mut. Ins. Co.*, 8 Met. 120 [41 Am. Dec. 489], it was held that such representations embodied in the policy partook in some measure of the character of both representations and warranties; that they need only be substantially true and correct, and that an exact and literal compliance was not required, as in other warranties; and that it was a matter of fact for the jury to decide whether such representations, incorporated into the description in the policy, were untrue in any respect material to the risk, or were sub-

stantially true and correct, and made in good faith without any intent to deceive. The rule is, that in cases of express warranty, it is wholly immaterial whether the matter warranted were material to the risk or not; but here the question is rather as to what was warranted. This depends partly upon the true interpretation and proper construction of the policy, and in part upon the question of fact whether the buildings were in fact, in every material respect, the same as they were described in the policy, and whether the actual warranty has been complied with or not. It becomes essentially a question whether the facts not literally embodied in the description in the policy, and so not disclosed, were material to the risk; and there can be no doubt that this is a question of fact for a jury to determine: 2 Greenl. Ev., sec. 397; *Firemen's Ins. Co. v. Walden*, 12 Johns. 513 [7 Am. Dec. 340]; *Macdowall v. Fraser*, 1 Doug. 260; *Littledale v. Dixon*, 1 Bos. & P., N. R., 151.

We do not undertake to decide whether the plaintiff would be entitled to recover at law or not. We decide only that he is not entitled to the equitable relief prayed for in his petition on the case made here.

The judgment will be reversed and the cause remanded, with leave to the plaintiff to proceed at law upon an amended petition, if he chooses to do so.

The other judges concur.

ADMISSIBILITY OF PAROL EVIDENCE to reform a policy of insurance: *Ripley v. Aetna Ins. Co.*, 86 Am. Dec. 362, and note 371; *Cooper v. Farmers' Mut. F. Ins. Co.*, 88 Id. 544, and note 549; *Stout v. City F. Ins. Co.*, 79 Id. 539, and note 547.

MATERIAL MISREPRESENTATION IN DESCRIPTION OF PROPERTY in the policy avoids it: *Gould v. York County Mut. F. Ins. Co.*, 74 Am. Dec. 494, and note 498; *Mutual F. Ins. Co. v. Deale*, 79 Id. 673.

QUESTION OF MATERIALITY OF MISREPRESENTATION or concealment in policy of insurance is for the jury: *Mutual F. Ins. Co. v. Deale*, 79 Am. Dec. 673; *Daniels v. Hudson River F. Ins. Co.*, 59 Id. 192; *Burritt v. Saratoga County etc. Ins. Co.*, 40 Id. 345, and note 351.

CONTRACT OF INSURANCE, RULE FOR CONSTRUING: *St. John v. American Mut. Life Ins. Co.*, 64 Am. Dec. 529, and note 531; *Grant v. Lexington etc. Ins. Co.*, 61 Id. 74; *National F. Ins. Co. v. Crane*, 77 Id. 289, and note 295.

USAGE OR CUSTOM AS AFFECTING POLICY OF INSURANCE, and admissibility of parol evidence to prove the same: *Daniels v. Hudson River F. Ins. Co.*, 59 Am. Dec. 192; *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Id. 309, and note 321.

ROGERS v. CROW.

[40 MISSOURI, 91.]

LAMPS, CHANDELIERS, CANDLESTICKS, CANDELABRA, SCONCES, GAS-FIXTURES, and the various contrivances for lighting houses by means of candles, oil, other fluids, or gas, are not fixtures, form no part of the realty, and do not pass under a sale thereof.

CHURCH ORGAN IS FIXTURE, AND PASSES TO GRANTEE, where in the building of the church a space or recess was left to be exclusively appropriated to the reception of the organ, and that part of the building was left incomplete, and never finished until the organ was put into position, which was necessary to give to that part of the house architectural perfection and symmetry, and to make it conform to the intention and uses in view when it was erected.

THE opinion states the facts.

Cline and Jamison, for the appellants.

Sharp and Broadhead, for the respondents.

By Court, WAGNER, J. This was an action commenced in the St. Louis court of common pleas, by the respondents, to recover the value of certain property which they alleged to be personal chattels belonging to them, and unlawfully possessed and detained by the appellants. From the record it appears that respondents were vestrymen and trustees for St. Paul's Parish, a Protestant Episcopal Church in the city of St. Louis, and that in their house of worship they placed an organ, gas-fixtures, and other articles, for the convenient occupancy of the same. That being pecuniarily embarrassed, they executed a deed of trust conveying the lot on which the house was built, together with all the buildings, erections, and improvements, to secure the payment of their indebtedness. The notes which the deed of trust was taken to secure not being paid, the trustees in the deed sold the premises to satisfy the same, and on the sale Derrick A. January became the purchaser of the property; January afterwards deeded and conveyed the property to appellants, who are now in possession thereof. On the trial, respondents dismissed their cause of complaint as to several of the articles enumerated in their petition, and the court found that others passed by the sale with the premises as part of the realty, but refused to declare that the gas-fixtures and the organ were fixtures, and decided that they were personal property detachable from the real estate, and therefore did not pass with it.

The evidence shows that when the church was erected there

was a niche or recess left in the walls over the vestibule, in the front end of the building, expressly for the reception of an organ; that the organ stands on a floor or platform built to receive it, and is fastened to this floor by nails driven through the outer case of the organ into the floor. In the rear of the organ the wall is in a rough, unfinished state, and is pretty much without ceiling or finish. If the organ were removed, it would not only destroy the architectural design, finish, and symmetry of the building, but would leave exposed to view the unfinished wall in the rear, and the open space above the organ which is now concealed by it. Skillful architects testified that they regarded the organ as a part of the church; the internal finish of the building, architecturally considered, would not be complete without it.

If this contest had arisen between landlord and tenant, it would admit of little doubt; for as between landlord and tenant many things which pass under the general name of fixtures will for the encouragement of trade be permitted to be removed by the tenant during his term, which, as between heir and executor, vendor and vendee, or mortgagor and mortgagee, would be considered as part and parcel of the realty, and would therefore belong to the heir, or vendee, or mortgagee.

As to the first point presented in the case, it has been uniformly held that lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses by means of candles, oil, or other fluids, are not fixtures, and form no part of the freehold.

In the case of *Lawrence v. Kemp*, 1 Duer, 363, the New York superior court decided that gas-fixtures, when placed by a tenant in a shop or store, although fastened to the building are not fixtures as between landlord and tenant.

In *Wall v. Hinds*, 4 Gray, 256. [64 Am. Dec. 64], it was held that a lessee could take away gas pipes put by him into a house leased to him for a hotel, and passing from the cellar through the floors and partitions, and kept in place in the room by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal.

In South Carolina a house and lot were sold under a foreclosure of mortgage, and a few days afterwards the sheriff, under execution against the mortgagor, removed and sold certain gas chandeliers and pendant hall gas-burners, and the court

decided unanimously that they were not fixtures which passed to the purchaser of the real estate by the conveyance of the land: *Montague v. Dent*, 10 Rich. 135 [67 Am. Dec. 572].

The same question arose in Pennsylvania in the case of *Vaughen v. Haldeman*, 33 Pa. St. 522 [75 Am. Dec. 622], where property was sold by the sheriff in pursuance of an execution placed in his hands, and it was decided in the same way, the court holding that gas-fixtures did not pass under the sale to the vendee as a part of the realty. In his opinion, Read, J., says: "The pipes connect with the street main, and are now carried up through the walls and ceilings of the house, with openings at the points where it is intended to attach fixtures for the purpose of lighting the rooms and entries. These are called gas-fittings; whilst the chandeliers and other substitutes for the oil lamps and candles are called gas-fixtures, and are screwed on to the pipes, and cemented only to prevent the escape of gas; and may be removed at pleasure, without injury either to the fittings or to the freehold. There is therefore really nothing to distinguish this new apparatus from the old lamps, candlesticks, and chandeliers, which have always been considered as personal property."

The next question, as to whether the organ is to be regarded as a fixture is not entirely clear. Great diversity exists in the adjudications on this subject, and few decisions can be considered as absolute authorities in other instances, even of fixtures of a similar denomination. It will be found on an examination of the books that considerations of custom, intention, ornament, convenience, and so forth, have all had influence in controlling the cases. Whilst it has been held that chattels should not be regarded as fixtures unless they are so far incorporated with the structure of which they form a part that they cannot be severed from it without injuring the structure itself, as in *Farrar v. Chauffetete*, 5 Denio, 527, yet the general course of decision is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purpose for which it is employed or held, however slight or temporary the connection between them: *Walmsley v. Milne*, 7 Com. B., N. S., 115; *Wilde v. Waters*, 16 Com. B. 637. In accordance with this rule, it has been held repeatedly that the machinery of a manufactory is to be regarded as a part of the realty, whether it is attached to the body of the building, or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure and without

injury to the freehold. In general, it may be said that as between vendor and vendee the purchaser is clearly entitled to everything that has been annexed to the freehold with a view of increasing its value or adapting it to the purposes for which it is used; and within this principle it has been held that pipes and bath-tubs of a dwelling, the counters of a store, the vats, stills, and kettles of a brewery or distillery, are fixtures: *Cohen v. Kyler*, 27 Mo. 122; *Tabor v. Robinson*, 36 Barb. 485; *Main v. Schwarzwaelder*, 4 E. D. Smith, 273; *Bryan v. Lawrence*, 5 Jones, 337.

Mr. Dane, in his Abridgment of American Law, remarks: "It is very difficult to extract from all the cases as to fixtures in the books any one principle upon which they have been decided; though being fixed and fastened to the soil, house, or freehold, seems to have been the leading one in some cases, though not the only one." And he further remarks: "Not the mere fixing or fastening is alone to be regarded, but the use, nature, and intention": 3 Dane's Abr. 156.

In *Teaff v. Hewitt*, 1 Ohio St. 511 [59 Am. Dec. 634], Chief Justice Bartley, after a very able review of the authorities, reached the conclusion that the united application of the following requisites might be considered the safest criterion of a fixture: "1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use and purpose of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made."

In the building of the church a space or recess was purposely left to be exclusively appropriated to the reception of an organ; that part of the building was left incomplete, and was never finished till the organ was put in position. This was necessary to give that part of the house perfection, symmetry, and make it conform to the intention and uses had in view when it was erected. Architecturally, it was incomplete till the organ was fitted and fastened, and the workmen closed their labors, hiding the unfinished walls in the rear. The character or permanency of the annexation in this particular case can have no controlling or preponderating weight. Upon an examination of the design, use, and adaptability, the evi-

dence of intention was manifest and unmistakable, and the purchaser had a right to be governed by these considerations in regarding it as a fixture. In the execution of the deed of trust, the grantors made no reservation, and it must be presumed that they intended everything should pass by their deed that was annexed to the realty, and stand pledged as a security for the debt. Under all the circumstances, we are of the opinion that the organ was a fixture, and formed parcel of the realty, and as such is rightfully the property of the grantees.

The judgment must be reversed and the cause remanded. The other judges concur.

APPARATUS FOR LIGHTING HOUSES, WHETHER FIXTURES: *Johnson's Ex'r v. Wiseman's Ex'r*, 83 Am. Dec. 475, and note 480; *Wall v. Hinds*, 64 Id. 64, and note 75, 76.

RULE FOR DETERMINING WHETHER THING IS FIXTURE: Note to *Gray v. Holdship*, 17 Am. Dec. 687-695; *Teaff v. Hewitt*, 59 Id. 634, and note 657; *Providence Gas Co. v. Thurber*, 55 Id. 621, and note; *Congregational Society v. Fleming*, 79 Id. 511, and note 513.

GARNHART v. FINNEY.

[40 MISSOURI, 449.]

COVENANT OF LESSEE FOR HIMSELF AND ASSIGNS to build houses on the land demised binds the assignees by express words, and the covenant runs with the land.

ACCEPTANCE OF RENT BY LANDLORD after notice or knowledge of a failure for which a forfeiture might have been claimed is a waiver of the forfeiture.

ANY RECOGNITION OF TENANCY SUBSISTING after the right of entry has accrued and the landlord has notice of the forfeiture, has the effect of a waiver. Slight acts are sufficient for this purpose, such as a continuance of the lease without re-entering to take the land itself or an acceptance of the rent.

FORFEITURES ARE NOT FAVORED IN LAW, and when once waived will not be assisted by the court.

WHEN ESTATE IN LAND HAS BEEN FORFEITED by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent period; and when a covenant has been broken already, the acceptance of performance of a new agreement substituted in place of it will have the same effect.

ACCEPTANCE OF RENT WITH KNOWLEDGE OF PREVIOUS CAUSES OF FORFEITURE implies a still subsisting lease, and precludes a forfeiture afterwards for the same causes, and so the acceptance of performance of a building covenant, or of an agreement substituted in place of it, together with the continued acceptance of rent, has the same effect.

LANDLORD WHO, BY HIS WORDS OR ACTS, knowingly causes his tenant to believe in the existence of a certain state of things, and induces him to act upon that belief, so as injuriously to alter his position, will be estopped from averring as against the tenant a different state of things as existing at that time, or if he asserts a fact upon which the tenant acts and will receive damage if the fact is not true, he will be estopped from contradicting it.

LANDLORD WHO HAS WAIVED the forfeiture of the lease and accepted a substituted agreement and new arrangement cannot resist covenants to renew the lease.

MEASURE OF DAMAGES FOR REFUSAL TO RENEW LEASE after a waiver of forfeiture by the landlord is the value of improvements made during the first term and the future value of the leasehold, less the expense of repairs made during the first term.

THE opinion states the facts.

Krum, Decker, and Krum, and Gantt, for the appellant.

Glover and Shepley, and Cline and Jamison, for the respondent.

By Court, HOLMES, J. This is an action for damages on a breach of covenant for the renewal of a lease, at the suit of the last one of several successive assignees against the lessor. The lease provided that every failure to pay the quarterly rent reserved, or to pay the taxes, or to keep any [or] perform any of the other covenants, agreements, or stipulations therein set forth, should "make and create a forfeiture of the lease," if so determined by the lessor, by a notice in writing. The lease was not to be assigned by the lessee, under penalty of forfeiture, without the written consent of the lessor. The lessee bound himself, his heirs, executors, administrators, and assigns, to erect three good and substantial three-story brick houses of a specific quality and description on the lot demised, within the first two years of the term, which were to be the property of the lessor at the end of the lease and renewals. The lease was for a term of ten years, and was to be renewed for another term of ten years, "provided the said lessee, or his legal representatives or assigns, shall punctually pay all the rents and taxes" which might be assessed and legally demanded, "and perform all the other covenants, agreements, and stipulations herein set forth." The renewed lease was to contain similar covenants, except that the rent was to be fixed upon a valuation by appraisement in the lease specially provided; and a second renewal for still another term of ten years was to be made in the same manner, and subject to like covenants, agreements, and stipulations.

There was evidence to the effect that some of the successive assignments of the lease had been made without license in writing, and some upon a written consent, which had been lost; but that the lessor had never enforced a forfeiture of the lease for this or any other reason, and had accepted rent with full knowledge of this failure, from the several assignees in succession down to the end of the term; that the three houses had not been built within the first two years of the term; that the time had been afterwards extended by the lessor by a writing, which had been lost, or was not produced; and that the assignee in possession, with this knowledge and consent of the lessor, and in pursuance of an arrangement made with him, had proceeded to erect these three houses under the lease, which were still not complete within the extended time, nor to the entire satisfaction of the lessor,—but that upon certain alterations and improvements being made under the supervision of certain arbitrators, the lessor had finally consented not to insist upon forfeiting the lease, and accepted the buildings as they were, as a performance of the covenant, and expressed himself satisfied; he continued afterwards to accept rent as before until the end of the term, and never took any steps to forfeit the lease.

At the end of the term the lessor refused to renew the lease according to the covenant for renewal, proceeded to eject the tenants, and took possession of the property. He now takes the ground that the covenants and agreements on which the stipulation for a renewal depended had not been kept and performed according to the terms and conditions of the lease, and that he was not bound to renew. It is answered, on the other side, that all right of forfeiture for the reason that the lease had been assigned without the written consent of the lessor, or that the other covenants had not been kept, had been waived by the subsequent acceptance of rent, with notice of the cause of forfeiture, and that any right to refuse a renewal of the lease on account of any breach of the building covenant had been waived; also by his own acts, and by his acceptance of performance of the substituted agreement, that he was estopped to deny that this covenant had not been performed.

The covenant of the lessee for himself and assigns to build houses on the land demised binds the assignees by express words, and the covenant runs with the land: *Dumpor's Case*, 1 Smith's Lead. Cas. 102.

The acceptance of rent after full notice or knowledge of the

failure for which a forfeiture might have been claimed was a waiver of the forfeiture, which could not afterwards be asserted: 1 Smith's Lead. Cas. 83; *Goodright v. Davis*, Cowp. 803; *Roe v. Harrison*, 2 Term Rep. 225; *Arnsby v. Woodward*, 6 Barn. & C. 519.

It was in evidence that the landlord elected to retain the reversion with its incidents, and continue the lease, without re-entering to take the land itself. Slight acts are deemed sufficient for this purpose, and any recognition of a tenancy subsisting after the right of entry has accrued, and the lessor has notice of the forfeiture, will have the effect of a waiver: 2 Platt on Leases, 468; Taylor's Landlord and Tenant, secs. 497, 498; *Coon v. Brickett*, 1 N. H. 163; *Jackson v. Bronson*, 7 Johns. 227 [5 Am. Dec. 258]; *Jackson v. Allen*, 3 Cow. 220. A man may be estopped by acceptance of rent: 4 Com. Dig., tit. Covenant, A, 3, p. 79.

The principle is not confined to a forfeiture for assigning without license, or for non-payment of rent, but extends to any other ground of forfeiture which merely makes the lease voidable, unless the lessee proceeds to enforce the forfeiture by re-entry. Forfeitures are not favored in the law, and where a forfeiture is once waived, the court will not assist it: Cowp. 803. The clause in this lease which gave a right of forfeiture and re-entry for non-payment of rent and taxes, or for any failure to keep and perform the covenants, agreements, and stipulations in lease, did not make the lease absolutely void, but only voidable at the election of the lessor. It may be considered as well established that where an estate in land has been forfeited by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent period; and where a covenant has been broken already, the acceptance of performance of a new agreement substituted in place of it will have the same effect: 1 Smith's Lead. Cas. 88; *Chalker v. Chalker*, 1 Conn. 79 [6 Am. Dec. 206]; *Clark v. Jones*, 1 Denio, 516 [43 Am. Dec. 706]; *Jones v. Carter*, 15 Mees. & W. 718.

This covenant for a renewal depended only upon the condition that the lessee or his assigns should pay the rent and taxes, and perform the other covenants; and the lease was conditioned to be forfeited at the option of the lessor, on notice in writing, upon any failure to keep and perform these same covenants. No forfeiture was enforced during the term. The rents were accepted to the end of the term with knowledge of

all causes of forfeiture. The failure to perform the building covenant was certainly well known to him, and the evidence tended strongly to prove that he had granted an extension of the time; that he was fully aware of the progress and completion of the work; that he complained, negotiated, and arbitrated, concerning it; that, upon urgent solicitation, he had forbore to take any steps to forfeit the lease; and that when the work was finished, though not done exactly according to the new agreement or the provisions of the building covenant, he not only accepted it as a performance, and expressed himself satisfied, but certainly forebore ever afterwards to claim any forfeiture on account of a failure to keep and perform that covenant or any other. He stood by and saw the work go on, and encouraged the assignee to expend his money in the completion of valuable buildings, which were to become his property at the termination of the lease and renewals. He knew that the work was done under a full persuasion that it would be accepted as a performance, or in place of a performance, of this covenant. The work was done within about four years of the end of the term; and now, after such acceptance, he insists upon a breach of this covenant as a justification for his refusal to renew the lease, and claims that it had been irrevocably broken before the work began.

It is not to be supposed that the assignee had any expectation that his lease was to end in four years after the erection of these houses, nor that the lessor was not fully aware that he relied upon a renewal of the lease according to its tenor, and depended upon his acceptance as a waiver of all cause of forfeiture and a performance of the covenant. It may as well be said of this waiver as a waiver of an assignment without license, that to hold otherwise would be "productive of great injustice, and enable a landlord to eject a tenant after he had given him reason to suppose that the forfeiture was waived, and after the latter had, on this supposition, expended his money in improving the premises": *Arnsby v. Woodward*, 6 Barn. & C. 519; 2 Platt on Leases, 469.

If a man be estopped by the acceptance of rent, and if such acceptance, with knowledge of the previous causes of forfeiture, implies a still subsisting lease, and precludes a forfeiture afterwards for the same causes, why may not the acceptance of performance of this building covenant, or rather of the agreement substituted in the place of it, together with the continued

acceptance of rent, be deemed an irrevocable waiver of this cause of forfeiture?

If the lessor intended to refuse a renewal, why did he not so inform the tenant before he began to build? or why did he allow him to proceed with the expenditure of his money? Not to hold that this was not a complete waiver would be a great hardship upon the plaintiff; and viewing the matters with reference to the whole conduct of the defendant, it would certainly have all the effect, if it did not wear the aspect, of an intentional fraud. When a man by his words or conduct knowingly causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as injuriously to alter his previous position, the former will be concluded from averring, as against the latter, a different state of things as existing at that time; or asserts a fact upon the faith of which another acts, and will receive damage if the fact be not true, he shall be estopped from contradicting it: *Brown v. Wheeler*, 17 Conn. 353 [44 Am. Dec. 550]. We think the case comes within the doctrine both of waiver and estoppel: 1 Greenl. Ev., sec. 207; *Dezell v. Odell*, 3 Hill, 215 [38 Am. Dec. 628]; *Townsend v. Empire Stone-dressing Co.*, 6 Duer, 208.

The defendant cannot now be heard to say that the covenants of this lease had not been fully performed. It matters not that the building covenant had been broken and the term elapsed. The substitution of a new arrangement, even by parol, which was acted upon by both parties, and executed to the satisfaction of the defendant, was enough. It is insisted that the proof of this satisfaction was not clear. We do not lay the whole stress upon this admission that he was satisfied. The facts themselves, the acts of the parties, the forbearance to claim a forfeiture, the acceptance of rent, the confiscation of the buildings, speak louder than his express admissions, and are even more satisfactory.

The first instruction given for the plaintiff placed the issue of a waiver by acceptance substantially before the jury on all the evidence bearing upon the question; and this issue was decisive of the case.

The instructions refused for the defendant proceeded upon a theory of the law which cannot be sustained.

As to damages, the general rule was correctly laid down by the court. It is insisted that the plaintiff was not entitled to recover for the expense of repairs made upon the premises shortly before the end of the first term. This may be so in

some cases; but here it was proper for the jury to consider as well the value of the improvements made during this first term as the future value of the leasehold in estimating the actual damage sustained by the plaintiff in the breach of the covenant to renew. The evidence tended to prove that the value of the future leasehold with the renewals was about twenty thousand dollars. The expense of repairs would seem to have been deducted in the verdict, which was for some sixteen thousand dollars only. We see no reason to think the verdict was excessive.

Judgment affirmed.

The other judges concur.

ACCEPTANCE BY LANDLORD OF RENT ACCRUING AFTER FORFEITURE operates as a waiver of the breach of a condition of the lease: *Gomber v. Hackett*, 70 Am. Dec. 467, and note 468; note to *Smith v. Mariner*, 68 Id. 85. The principal case is cited to the above point in *Horn v. Peteler*, 16 Mo. App. 440; *Moore v. Martin*, 23 Id. 661.

FORFEITURES WILL NOT BE ENFORCED: *Hall v. Delaplaine*, 68 Am. Dec. 57; *Whitton v. Whitton*, 75 Id. 163, and notes to these cases.

ACCEPTANCE OF FULFILLMENT OF CONDITION at a later day than the stipulated period is a waiver of all objections that it was not seasonably performed: *Crocker v. Old South Society in Boston*, 106 Mass. 498, citing the principal case.

EQUITY WILL COMPEL SPECIFIC PERFORMANCE OF COVENANT to renew a lease: *Biddle v. McDonough*, 15 Mo. App. 540; or hold the covenantor liable in damages for breach of the covenant: *Arnot v. Alexander*, 44 Mo. 28, both citing the principal case.

BERNECKER v. MILLER.

[40 MISSOURI, 473.]

POSSESSION OF ONE TENANT IN COMMON IS POSSESSION OF ALL. Where two are in possession together, and one only is turned out, and the other still remains, his possession is still that of the other also as well as his own.

THE opinion states the facts.

P. C. Morehead, for the appellants.

R. S. McDonald, for the respondent.

By Court, HOLMES, J. This was an action of forcible entry and detainer. It appears that the defendants had been in possession of the premises together as heirs and tenants in common; that Wendelin Miller (who held by right of his wife)

had taken a lease from the plaintiff, who was not in any actual possession of the premises at the time, which included these premises (as Wendelin says, by mistake in the description, of which he knew nothing, not being able to read English); and at the expiration of this lease the plaintiff sued him and obtained a writ of possession against him, which was executed by the sheriff by putting out Wendelin and his family, leaving Martin Miller in possession as before. There was nothing to show that either one of these tenants in common had the exclusive possession more than the other. After being put out, Wendelin and his family returned into the house, where Martin still remained.

This action is brought against both Wendelin and Martin, and is founded upon the idea that the plaintiff, by turning out Wendelin, had obtained the exclusive possession of the premises. But the sheriff did not turn out Martin, because his writ did not name him, and there was no re-entry by him upon any possession of the plaintiff. The plaintiff, being a witness, said that Martin was a hired man and a servant of Wendelin. Wendelin Miller testified that Martin occupied the premises before he went there, and continued to occupy a room in the house, not as his servant.

The court left it to the jury to say whether or not Martin was in possession only as the servant of Wendelin, and the jury found for the plaintiff.

The defendant asked the court to instruct the jury that, on the evidence, the plaintiff was not entitled to recover against Martin. This instruction was refused. We think the instruction should have been given. Martin was in possession as one of the tenants in common; he had not been dispossessed by the sheriff; he had not made any forcible entry upon any possession of the plaintiff. That he may have been a hired man to do work for Wendelin, or may have been his servant otherwise, was not conclusive of his right to the possession of the premises. The possession of one tenant in common is the possession of all. Where two are in possession together, and one only is turned out and the other still remains, his possession is still that of the other also as well as his own. We are inclined to think the case came within the decision in *Garrison v. Savignac*, 25 Mo. 47 [69 Am. Dec. 448], and that there was error in refusing the defendant's instruction.

Judgment reversed, and the cause remanded. The other judges concur.

POSSESSION OF ONE CO-TENANT IS POSSESSION OF ALL: *Alexander v. Kennedy*, 70 Am. Dec. 358; *Pool v. Morris*, 74 Id. 68; *Warfield v. Lindeil*, 77 Id. 614, and notes to these cases.

THE PRINCIPAL CASE IS CITED in Freeman on Cotenancy and Partition, 2d ed., sec. 167.

CHAMBERS'S ADMINISTRATOR v. WRIGHT'S HEIRS.

[40 MISSOURI, 482.]

COVENANT UNDER SEAL BETWEEN TENANTS IN COMMON, by which they bind themselves, their heirs, executors, or administrators, to bear equally the expenses of any suit by or against the parties to the contract involving the validity of the title to their lands, is a personal covenant, and embraces only such suits and expenses as may be commenced during the lifetime of the contracting parties, and does not include those which may be brought after the decease of such parties, and be prosecuted or defended by their heirs and personal representatives.

UPON DEATH OF ANCESTOR, HIS LAND PASSES TO HIS HEIRS or devisees. His personal representative takes no interest in it beyond a naked power to sell for the payment of debts, and the possession as well as the defense of the title belongs exclusively to the heirs or devisees.

THE opinion contains the facts.

B. A. Hill, for the appellant.

Glover and Shepley, for the respondents.

By Court, HOLMES, J. The case comes to this court by appeal from a judgment on demurrer to the petition. The suit was founded upon a written contract under seal between William Chambers, William Christy, and Thomas Wright, dated August 30, 1830. The parties had previously made a partition among themselves of a tract of land held by them as tenants in common under Louis Labeaume, and the general tenor of the contract related to costs and expenses to be incurred in prosecuting or defending the title to the lands so divided in partition, and to the equalization of losses which might be sustained by reason of defects in the title; and the particular clause which was made the foundation of this action read as follows: "And in the event of any suit or suits being prosecuted by or against the parties aforesaid, or either of them, involving the title of the original grant to Louis Labeaume, the expenses shall be equally borne by the parties hereto." The previous clauses related to suits and matters then pending and existing; the whole contract terminating

with this clause, "for the performance of which we bind ourselves, our heirs, executors, and administrators."

The suit is brought by the administrator of William Chambers against the heirs and devisees of William Christy, who died in 1837, and for expenses of suits concerning the title to said lands which were prosecuted or defended by the administrator after the decease of the original party whom he represented.

We think the demurrer was well taken. The contract concerned the personal acts of the persons named only, and related to suits to be prosecuted by or against them, or either of them, and at least commenced during the life of the party concerned, and to expenses which should be incurred in such suits. It did not embrace suits and expenses which should arise after the decease of the contracting parties, and be prosecuted or defended by their heirs and devisees or legal representatives. The whole scope of the agreement was confined to the immediate parties, to acts to be done by either one of them, and to suits which were at least begun to be prosecuted or defended by him in his lifetime, and to the expenses to be incurred therein. If any demand had arisen upon a breach of this contract in favor of William Chambers in his lifetime or after his decease, it would doubtless have been a debt against the other parties or their estates. No such demand ever arose or existed under the contract upon this petition.

If the suits in which the expenses sued for were incurred had been commenced by or against William Chambers in his lifetime, there is authority for saying that his administrator might have been bound to go on with them to their termination, and that all the expenses incurred therein, either before or after his decease, would have been incurred under this contract and by authority of its provisions, and that the debts thus created against the other parties, or their heirs, devisees, and legal representatives would have been assets of the estate of William Chambers for which his administrator might sue in his representative capacity; for this would not have been a personal engagement merely to be performed by the party himself only, depending upon his personal judgment, skill, and taste, and it might have been implied that he undertook and covenanted to prosecute or defend such suit to the end, and that the other parties covenanted to pay to him or his personal representatives their respective proportions of the ex-

penses to be incurred therein: *Marshall v. Broadhurst*, 1 Crompt. & J. 403; S. C., 1 Tyrw. 348; *Siboni v. Kirkman*, 1 Tyrw. & G. 777; *Edwards v. Grace*, 2 Mees. & W. 190; Chitty on Contracts, 98. Wherever the testator is bound by the covenant, his executor or administrator is bound also, unless it be such a covenant as was to be determined by his death, or was to be performed by him in person; he is not bound by a covenant for the personal act of the testator, unless there be a breach in his lifetime, but he may be bound to do a personal thing which the testator undertakes to do, and which is not determined by his death, but may be performed or completed by his personal representative, who may be said to represent him as to the performance of covenants which are by covenants to be performed, as well after as before his decease, but not as to covenants never made or things which he never undertook to perform at all: 2 Williams on Executors, 1487; 3 Com. Dig., tit. Covenants, C, 1, p. 263, and B, 1, p. 260; *Thurseden v. Warthen*, 2 Bulst. 158; *Harvey v. Oswold*, Cro. Eliz. 553; *Hovey v. Newton*, 11 Pick. 42; *Labarge v. McCausland*, 3 Mo. 585.

The party here did not covenant that he would prosecute or defend all such suits as might thereafter be brought, nor that he would pay the expenses thereof; and it is not the case of a breach of covenant on his part to be performed. The contract is to be construed with reference to the subject-matter and according to the intentions of the parties: *Browning v. Wright*, 2 Bos. & P. 13; Story on Contracts, sec. 567. We cannot add anything to the terms in which it is expressed. It may be understood as a power given to incur expenses in any suit prosecuted by or against either of the parties involving the title in question, and to charge the other parties with their respective portions thereof. The charges so authorized are made a debt against them, for the payment of which they bind themselves, their heirs, executors, and administrators. This power is given to William Chambers, but not to his heirs or legal representatives; they are not named or designated in the contract as grantees of any such power. It is not said that his heirs or legal representatives may incur such expenses at their charge, nor that they, their heirs or legal representatives, would be liable for the expenses of all suits that might be commenced or prosecuted or defended after the decease of all the immediate parties by such heirs or legal representatives in all future time. The expenses sued for were incurred after the decease of all the

original parties to the contract. We do not see how the administrator could derive any authority from this instrument to prosecute or defend these suits, or to incur the expenses at the charge of the defendants or their ancestors; and it is needless to inquire by what authority he did actually proceed. The real estate descended to the heirs or passed to the devisees; the personal representative takes no interest in the lands descended but a naked power to sell for the payment of debts, and the possession as well as the defense of the title belongs to the heirs and devisees. The administrator had nothing to do with it: *Aubuchon v. Lory*, 23 Mo. 99.

This does not belong to the class of covenants which run with the land and concern the tenure and enjoyments of the property conveyed. It is purely a personal and collateral covenant; and there is no such privity of contract between the parties here as can bind them any further than they are expressly bound by the terms of the written instrument: *Hurd v. Curtis*, 19 Pick. 459; 2 Washburn on Real Property, 16; 1 Smith's Lead. Cas., 4th ed., 118; 3 Com. Dig., tit. Covenants, C, 3, A, 2, pp. 256-265. There is no debt against the defendants or their ancestors, arising under the contract, which would be assets to be recovered by the plaintiff; and it is therefore unnecessary to inquire in what manner any such debt could be enforced against these defendants, as heirs and devisees, after administration closed.

Judgment affirmed. The other judges concur.

THE PRINCIPAL CASE IS CITED in Rawle on Covenants for Title, 547, 554, as to whether covenants to defend the title made by the ancestor terminate with his death, or run with the land and bind the heir.

HEIRS HOLD TITLE TO LAND FROM INTESTATE in their own right, subject only to his debts, and not subject to any other control of the administrator: *Walbridge v. Day*, 83 Am. Dec. 227, and note 230; *Carnall v. Wilson*, 76 Id. 351, and note 357; *Rose v. Newman*, 80 Id. 646.

PROBATE OR COUNTY COURTS POSSESS NO POWER to allow any claims against a decedent's estate, or to order the sale of land belonging thereto, except to pay the debts of the deceased existing at his death: *Presbyterian Church v. McElhinney's Adm'r*, 61 Mo. 543; *Ritchey v. Withers*, 72 Id. 559; *Zoll v. Carnahan*, 83 Id. 40; *Dillinger v. Kelley*, 84 Id. 565; *Scudder v. Ames*, 89 Id. 521, all citing the principal case.

UPON DEATH OF INTESTATE, HIS LAND DESCENDS DIRECTLY TO HIS HEIRS. The administrator takes no interest therein, except for the payment of debts: *Zoll v. Carnahan*, 83 Mo. 40, citing the principal case.

STURGEON v. SCHAUMBERG, 40 Mo. 486, is decided upon the authority of the principal case.

BALLENTINE v. NORTH MISSOURI R. R. Co.

[40 MISSOURI, 491.]

MEASURE OF OBLIGATION AND SUFFICIENCY OF ACCOMMODATION OF COMMON CARRIER to furnish transportation must be determined by the amount of freight ordinarily carried on any given line of road. This duty of the carrier is not peculiar to any season of the year, or any special emergency which may arise in the course of business; thus if by reason of a sudden or unusual demand for stock or produce in the market, or from any other cause, there should be a sudden and unexpected influx of business, the obligation to carry will be fully met by shipping the freight in the order and priority of time in which it is offered.

CARRIER'S MEANS OF TRANSPORTATION MUST BE SO DISTRIBUTED at the various stations along the road as to afford a reasonable amount of accommodation for all. One station must not be furnished with means of transportation to the prejudice of another.

CARRIER MUST RECEIVE ALL FREIGHT that may be offered, and within a reasonable time, and in the order in which it is offered, transport it to the point designated by the owner or party in charge. This duty must be performed in good faith, without favor or partiality to any one.

NEGLIGENCE OF CARRIER IN DELAY IN TRANSPORTING FREIGHT is a question for the jury from all the facts and circumstances in the case.

CARRIER IS NOT LIABLE FOR DELAY IN TRANSPORTING FREIGHT, if such delay is occasioned by the act of God; and a snow-storm, which hinders and delays the carrier in the performance of his duty, is such an act as will exonerate him from liability.

CARRIER IS RESPONSIBLE FOR NATURAL OR ORDINARY and proximate consequences of his acts, but not for such as are remote and extraordinary; thus if there is a delay in the shipment of stock, and the bad faith of the carrier is shown, the necessary expense in feeding and attending it is the natural and immediate consequence of his act; but for the death or shrinkage in weight in the stock, caused by a storm, he is not liable.

THE opinion states the facts.

Moss and Hunton, and Orrick, for the appellant.

Hicks and Doniphan, for the respondent.

By Court, FAGG, J. The law defining and regulating the duties of railroad companies as common carriers is so well settled now as to admit of little doubt or controversy. As preliminary, however, to the determination of the questions involved in this case, it may be stated that the laws of the state require each railroad corporation to "furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation," etc.: R. C. 1855, p. 435, sec. 44. The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a

company to the public in this respect is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered: *Galena etc. R. R. Co. v. Rae*, 18 Ill. 488 [68 Am. Dec. 574]; *Wibert v. New York etc. R. R. Co.*, 19 Barb. 36. Any other construction of the statute would be unjust to the railroad companies, without benefiting the public.

It seems to have been the theory upon which the petition proceeded in this case, that it was the duty of the defendant to have shipped the live-stock in the order of time in which it was offered with reference to the entire line of its road, and not to any particular station. This is altogether unreasonable, and in its practical operation would work great hardships upon all companies. Its duty in this respect, then, must be understood in reference to each particular station, and not to the operation of the road as a whole.

Whilst it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various stations for receiving passengers and freight along the entire line of its road, as to afford a reasonable amount of accommodation for all. Or, to state it differently, no one station should be furnished with means of transportation to the prejudice of another, but a distribution should be made among all in something like a just proportion to the amount of business ordinarily done at each. Its duty is to receive all freight that may be offered, and within a reasonable time, and in the order in which it is offered, to transport the same to any other point on the line of its road that may be designated by the owner or other person having charge of it. This duty to the public must be performed in good faith, and without partiality or favor to any one. Every individual in the community by complying with the prescribed rules and regulations of the company has an equal right to demand the performance of this duty, and the law does not excuse a

discrimination in this respect any more than it does a discrimination in favor of any particular station on the line of its road. In every proceeding, therefore, against a railroad company for neglect of its duty, either in receiving or shipping freight in the order in which it is offered, the good faith of its conduct in the matter complained of is a proper subject of inquiry, and if found to be wanting, should receive the severest condemnation and censure from the courts of the country.

The petition contains five counts, charging the defendant with neglecting its duty in failing and refusing to receive for shipment a large number of hogs offered at one of its stations called Allen, and also for failure to deliver a lot of dead hogs, and for failure to deliver in a reasonable time and in good order a certain lot of dressed hogs, all shipped at said station for the city of St. Louis. The first alleged a special contract for the shipment of a large number of hogs within a given period of time. Under the instructions of the court below, the issue on this count was found for the defendant. The second alleged a shipment of a large number of dead hogs from Allen station to St. Louis, and an entire failure of defendant to deliver any portion of them. The third was for a like shipment of seventeen dressed hogs, not delivered in good order and within a reasonable time. The fourth and fifth counts simply varied the statement of the same cause of action substantially. The jury, in the verdict, returned a separate finding and assessment of damages under each of the last four counts in the petition. This finding was stated to be what was understood to be their duty under the instructions of the court, and coupled with the further statement that their intention was to assess the whole amount of damages returned, \$3,728.78, under the third and fifth counts alone. Plaintiff thereupon elected to take his damages so assessed, and judgment was entered accordingly.

As to the finding of the jury on the third count, there is no controversy here, and we pass to the consideration of the question as to whether the jury was properly directed as to the liability of the company and the measure of damages in such cases. Plaintiff's claim for damages on the fifth count was based upon the allegation that on or about the fifteenth day of December, 1863, in accordance with the rules of the company, he registered for shipment on said road and at said station five hundred fat hogs; that if all the hogs then regis-

tered at said station had in good faith been shipped in their proper order, his turn would have been reached by the 25th of said month; that defendant acted with partiality in shipping for other parties hogs offered for shipment after the date at which plaintiff's hogs were registered, and that from said first-mentioned date continuously on until the 17th of January following, his hogs being at or near said station, were offered for shipment; that at said last-named date they were, by direction of the defendant's agents, driven to another station on the road, and shipped on the 23d of January, 1864; that during this period of time plaintiff expended a large amount of money in feeding and taking care of his hogs, that 120 of them died, and that he sustained heavy damages thereby, as well as in the shrinking in weight of the remainder.

These allegations were severally denied, with an averment in the answer that the means of transportation were sufficient to do the amount of business ordinarily required upon the road; that there was at this period an unusually large quantity of live-stock awaiting shipment all along the line of this road, and greatly beyond the capacity of defendant to receive and transport the same as it was offered; and to add to the embarrassment of the company, and in its inability to accommodate the public as speedy as it might otherwise have been done, there was, on or about the thirty-first day of December, an unusual snow-storm, which, with the extreme severity of the weather that followed it, greatly obstructed defendant's road, and for the period of two weeks hindered and delayed the running of trains.

Of the series of instructions given at the instance of the plaintiff, it will only be necessary to consider the third, the remainder being treated as substantially correct. An application of the principles enunciated in the preceding part of this opinion will demonstrate the fact at once that the first part of that instruction must be held to be erroneous.

The duty of the company to receive the plaintiff's hogs in the order of time in which they were offered for shipment is to be understood as referring to that station, and not to all the stations on the road. As to whether the failure of defendant to receive and ship plaintiff's hogs in their proper order and within a reasonable time was a willful neglect or refusal to perform its duty, was a question of fact to be considered by the jury, with reference not only to its liability to furnish

sufficient means of transportation for this purpose, but also in reference to any other fact that would be sufficient in law to excuse such failure. No argument or citation of authorities is considered necessary to establish the fact that the matter set up in answer by way of excuse, and to show that defendant for a portion of the time of which plaintiff complains was prevented from performing its duty, was, properly speaking, the act of God. The snow-storm as described by the witnesses, to the extent that it hindered and delayed the defendant in the performance of its duty, should have been considered by the jury. The testimony of John Ballentine, who was the brother and agent of the plaintiff, tends to show that the hogs could not have been shipped previous to the storm, and indeed down to the very time at which they were driven away to be shipped elsewhere. After stating that the five hundred hogs mentioned were driven to Allen on the 14th of December, he says: "I understood there were eighty car-loads there waiting for transportation when we got there; I thought we should not get through by spring." This was in his examination in chief. On cross-examination he said: "We got to Allen on the 14th of December. Mr. Salisbury had one or two car-loads of hogs. I don't think our turn would have come before we left in case Salisbury's hogs had not been taken." No testimony is preserved in the bill of exceptions that conflicts with these statements. With a showing so favorable to the defendant by the plaintiff's own testimony down to a period after the occurrence of this storm (which is described by the witnesses on both sides as one of great severity), the court should have told the jury that it was one of the facts in the case to be considered by them in determining whether or not the defendant was excused from his liability to receive the hogs within the period of time mentioned in the petition.

The only remaining point for consideration is the question of damages. The elementary books as well as the opinions of the courts attempt to lay down a general rule upon this subject, which is, substantially, that carriers are responsible for the natural or ordinary and proximate consequences of their acts, but not for such as are remote and extraordinary: Sedgwick on Measure of Damages, 3d ed., 63; 2 Greenl. Ev., sec. 256; *Clark v. Pacific Railroad*, 39 Mo. 184.

The general statement of the rule is easy enough, but the point of difficulty frequently is to ascertain whether a given

case is within it or not. Here the act complained of is the failure to receive in its proper order of priority stock offered for shipment. If the bad faith of the defendant is made to appear, he is liable for whatever damages can be shown to have resulted to the plaintiff as the natural and proximate consequences of its act. The delay occasioned to the plaintiff, and the necessary expenses in feeding and taking care of the hogs, are therefore to be taken in such case as the natural and immediate consequences of the act. But this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it could be made to appear that these effects were in some manner caused directly by the act of the defendant.

The witness John Ballentine stated repeatedly in the course of his examination that "the freezing and piling caused the death of the hogs." His testimony in this respect is corroborated by all the witnesses. But very few of the hogs died previous to the occurrence of the storm, and the loss of the plaintiff in this respect, as well as the large amount of shrinkage in the weight of the hogs taken to market, was certainly the natural and proximate consequence of the storm, and not the failure of the defendant.

The snow-storm, being the act of God, could not have been anticipated by the parties, and in no sense could be called a consequence of the defendant's act.

It was proper in the instructions to the jury to give some prominence to the fact that after plaintiff's hogs had been registered for transportation, and out of the proper order of time two car-loads of hogs were shipped for Mr. Salisbury. This was an act of favoritism inconsistent with the duty of the defendant to the public; but it really cuts no figure in this case, for the reason that plaintiff showed by his own testimony that his turn would not have been reached before his hogs were driven away from that station, even if these two car-loads had not been shipped. No part of the damages sustained by plaintiff could have been attributed, therefore, directly to this wrongful act.

The instructions asked by the defendant, and refused by the court of common pleas, and numbered in the bill of exceptions as 1, 2, and 3, ought to have been given.

For the giving of an improper instruction at the instance of plaintiff, and the refusal of those asked by the defendant, the judgment must be reversed and the cause remanded.

WAGNER, J., concurred.

HOLMES, J., having been of counsel in the court below, did not sit.

COMMON CARRIER MUST FURNISH SUCH FACILITIES for transportation as will meet the ordinary demands of the public, but is not bound to anticipate or provide in advance for an unusual influx of freight: *Galena etc. R. R. Co. v. Rae*, 68 Am. Dec. 574, and note 577. The principal case is cited to this effect in *Pittsburg etc. R'y Co. v. Morton*, 61 Ind. 575, where it is held that the first carrier is not liable for the delay of a connecting carrier in forwarding freight where there is a sudden influx of business.

COMMON CARRIER'S DUTY TO RECEIVE AND CARRY FREIGHT: *Maybin v. South Carolina R. R. Co.*, 64 Am. Dec. 753; *Galena and Chicago R. R. Co. v. Rae*, 68 Id. 574, and note 577; *Western Transportation Co. v. Newhall*, 76 Id. 760, and note 775.

COMMON CARRIER IS LIABLE FOR INJURY to goods by act of God, where they were exposed by the carrier's unreasonable delay in forwarding them: *Leal v. Spaulding*, 86 Am. Dec. 426, and note 433.

LIABILITY OF COMMON CARRIER for injury resulting from his direct or proximate or remote acts: *Trow v. Vermont etc. R. R. Co.*, 58 Am. Dec. 191; *Kerwhacker v. Cleveland etc. R. R. Co.*, 62 Id. 246; *Vicksburg etc. R. R. Co. v. Putton*, 66 Id. 552; *Isbell v. New York etc. R. R. Co.*, 71 Id. 78.

CARRIERS ARE RESPONSIBLE FOR NATURAL, ordinary, and proximate consequences of their acts, but not for such as are remote and extraordinary: *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 12, citing the principal case.

HORWITZ v. EQUITABLE MUTUAL INSURANCE CO.

[40 MISSOURI, 557.]

WAIVER OF CONDITION IN POLICY OF INSURANCE. — Where policy of insurance provides that it shall be void in case of any other insurance not mentioned in or indorsed upon the policy, or in case of any subsequent insurance without notice to the insurer indorsed upon the policy, or the notice acknowledged in writing, such condition may be waived by the company as well by acts as by positive declarations; and the company may be estopped by a course of dealing, or open actions, inducing the insured to act to his detriment.

INSURANCE COMPANY IS BOUND BY ACTS OF LOCAL AGENT within the scope of his authority. Thus where the agent issues a policy containing a condition that it shall become void in case additional insurance is taken without notice to the company indorsed on the policy, or otherwise acknowledged by them in writing, but expressly agrees with the insured to obtain, and does obtain, additional insurance, after which, with a full knowledge of the facts, the company receives the premium, they will be deemed to have waived the condition in the policy.

THE opinion contains the facts.

Mason and Voorhis, for the appellant.

Sharp and Broadhead, for the respondent.

By Court, WAGNER, J. This was an action brought to recover the sum of five thousand dollars insurance on a policy, executed and delivered by the defendant to the plaintiff, covering a certain stock of foreign and domestic liquors. The policy contained this clause: "If the said insured or assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." The defense relied upon was, that after the issuance of the policy by the company, the insured procured further insurance without notifying the company of the fact, or having it indorsed upon the policy.

The facts, as they appear from the record, are, that one Berg, who was the agent for the defendant, went to the plaintiff's office, and the plaintiff informed him that he wanted insurance for ten thousand dollars on his stock of liquors. Berg told plaintiff that his company never took more than five thousand dollars on any stock of goods, but that he would get the other five thousand dollars in some other company. Plaintiff then signed the application, which was made out by the agent, Berg, and the premium was agreed upon for the whole ten thousand dollars, if he should effect the other insurance. Berg then took the application and handed it in at the office of the company, and informing the company at the same time that he had agreed to get five thousand dollars more, as the plaintiff wanted ten thousand dollars. To this it does not appear that the company made any objection, but accepted the risk, issued the policy, and received the premium. The next day, in compliance with his agreement, Berg effected the additional five thousand dollars insurance in the Western Insurance Company, and told the president and secretary of the defendant that he had succeeded in getting the remaining insurance for the plaintiff. The policy issued by the defendant was delivered to plaintiff in an envelope, which he never opened till after the loss occurred by fire, and no indorsement of approval was ever made on it by the defendant.

The defendant asked the court to declare the law to be, that, under the evidence in the case, "it was the duty of the

plaintiff, upon the procurement of additional insurance, to have so informed the defendant, with a view of giving actual notice thereof, and of obtaining its consent thereto by writing, by indorsement upon the policy, without which the plaintiff cannot recover." The court gave the declaration, but appended the following addition: "But if defendant was notified that its own agent was procuring the additional insurance of five thousand dollars for plaintiff, and that after it was obtained said agent notified the defendant of the fact, then it was the duty of the defendant to indorse such additional insurance on the plaintiff's policy, or to notify plaintiff of its refusal to do so; and until such refusal was notified, the defendant is estopped from setting up a defense that such additional insurance was not indorsed on its policy." The judgment was for the plaintiff.

Where the terms of a policy provide that it shall be void in case of any other insurance not mentioned in or indorsed upon the policy, or in case of any subsequent insurance without notice to the insurer, and indorsed upon the policy, or the notice acknowledged in writing, such stipulations have uniformly been held as conditions precedent to any right of recovery on the policy: *Hutchinson v. Western Ins. Co.*, 21 Mo. 97 [64 Am. Dec. 218]; *Deitz v. Mound City Mut. F. & L. Ins. Co.*, 38 Id. 85. But it is not questioned that the conditions may be waived by the company, and such waiver may be made as well by acts as by positive declarations. The company may also be estopped under certain circumstances, where, by a course of dealing, or its open actions, it has induced the insured to pursue a policy to his detriment. Now, what were the terms of the contract? Why, that the plaintiff wanted ten thousand dollars insurance on his stock, and that defendant's agent agreed to procure it for him. This agreement was notified to the company, and no objection was made; its own rules or custom forbade it taking more than five thousand dollars, but it was the common practice, in negotiating for policies, for the agent to get what was wanted above that amount in other companies. The company knew that the agreement made by its own agent was for ten thousand dollars, and it also knew that he had obtained the additional five thousand dollars; the whole matter formed one continuous transaction; and while a mere verbal notice given by a party other than the insured would not be a sufficient compliance with the conditions, yet here it entered into the

contract so palpably, with the implied assent and acquiescence of the company, that to hold it not bound would be sanctioning the most manifest injustice. By the express agreement, of which the company was entirely cognizant, the insured was lulled into security, having an abiding confidence that his contract would be carried out in good faith. It is very true that a written contract should not be altered, varied, or impaired, by parol evidence; but this rule only applies where the writing constitutes the mutual agreement of the parties. When the policy was issued, the company was apprised of the agreement that its agent had made; and when the agent secured the further insurance, carrying out the whole contract, it did not repudiate the transaction, or offer to cancel the policy. Under the circumstances, if it did not intend to be bound, it was its duty to speak and act.

This case differs essentially from those cited in the books, where the only questions were as to the validity of the notice. The defendant received the premium with a full knowledge of all the facts, and it ought not to be permitted to gainsay its acts when it will have the effect of defrauding the other contracting party.

Let the judgment be affirmed.

The other judges concur.

EFFECT OF CONDITION REQUIRING NOTICE OF OTHER INSURANCE, and the company's consent thereto to be indorsed on the policy: *Hutchinson v. Western Ins. Co.*, 64 Am. Dec. 218, and note treating the subject, 221; *Hale v. Mechanics' Mut. F. Ins. Co.*, 66 Id. 410, and note 413; *National F. Ins. Co. v. Crane*, 77 Id. 289, and note 295. The principal case is cited with approval on the above point, in *Hayward v. National Ins. Co.*, 52 Mo. 188, 195. It is again cited in *Pelkington v. National Ins. Co.*, 55 Id. 177, to the point that if the agent of the company waive such a condition in the policy, the company will be bound by his actions.

THAT INSURANCE COMPANIES ARE BOUND BY ACTS of their agents when acting within the scope of their authority, see note to *Clark v. Union Mut. F. Ins. Co.*, 77 Am. Dec. 724 et seq.; note to *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 66 Id. 379; and *Insurance Company v. Wilkinson*, 13 Wall. 235, citing the principal case to this point.

WAIVER OF CONDITION IN POLICY BY AGENT: *Bochen v. Williamsburg City Ins. Co.*, 90 Am. Dec. 787, and note 790.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

PEOPLE v. LOUGHRIDGE.

[1 NEBRASKA, 11.]

**INDICTMENT FOR LARCENY WILL NOT LIE AGAINST ONE IN POSSESSION OF
GOODS stolen by him in another state.**

INDICTMENT for larceny. The opinion states the case.

J. W. Savage, for the plaintiff in error.

G. W. Doan, district attorney, for the defendant in error.

By Court, CROUNSE, J. The plaintiff in error, Charles Loughridge, was tried at the the October term of the district court for Douglas County, upon an indictment charging that on the thirtieth day of August, 1867, in the county of Douglas, state of Nebraska, he did steal, etc., a pocket-book and other property to the amount of about five hundred dollars. The evidence shows that the property in question was taken from one Hanson at St. Johns, in the state of Iowa, and found in the possession of Loughridge a few days subsequently at Omaha, in Douglas County, in this state. The judge in effect charged the jury that if they found that the prisoner feloniously took the property in the state of Iowa, and escaped into this state, and was found in possession of it in Douglas County, they might find him guilty under the indictment. The jury returned a verdict of guilty. Motions were made for a new trial and in arrest of judgment, which were overruled; and the case is brought here on alleged error, lying chiefly in the charge to the jury. Whether an indictment for larceny can be supported where property is originally stolen in one of

the United States and carried into another state, where the thief is arrested and prosecuted, is a question upon which the cases are in conflict. In Massachusetts: *Commonwealth v. Cullins*, 1 Mass. 116; Connecticut: *State v. Ellis*, 3 Conn. 185 [8 Am. Dec. 175]; Vermont: *State v. Mockridge*, 11 Vt. 654; Ohio: *Hamilton v. State*, 11 Ohio, 435; and Maryland: *Cummings v. State*, 1 Har. & J. 140, — such indictments have been sustained. In New York: *People v. Gardner*, 2 Johns. 477; *People v. Schenck*, 2 Id. 479; Pennsylvania: *Simmons v. Commonwealth*, 5 Binn. 617; Tennessee: *Simpson v. State*, 4 Humph. 456; and North Carolina: *State v. Brown*, 1 Hayw. (N. C.) 100 [1 Am. Dec. 548], — the contrary doctrine has prevailed. The force of the Massachusetts cases, however, holding as above, is very much shaken by the opinion of Chief Justice Shaw, in the much more recent case of *Commonwealth v. Uprichard*, 3 Gray, 434 [6 Am. Dec. 762], where he holds that stealing goods in one of the British provinces, and bringing them into Massachusetts, will not support an indictment in that state. I can discover no reason applying in that case which does not obtain in case of an indictment found in one state where the goods are brought from one into another. The different states are altogether as independent of each other in point of jurisdiction as any two nations.

No case sustaining an indictment under such circumstances asserts the rights of courts of one state to entertain jurisdiction of cases where crimes were committed in other states; but they all proceed upon the assumption that the possession in the thief amounts to a larceny in every county into which he carries the goods, because the legal possession remains in the true owner, and therefore every moment's continuance of the felony amounts to a new caption and asportation. There is considerable subtilty in this principle, and it was no doubt suggested for the convenience of trying felons in the county where they might be taken with the goods, and to avoid their escaping punishment by fleeing from one state or locality into another. No legislator in defining larceny, and affixing a penalty to the offense, ever contemplated such an interpretation. To allow this interpretation to hold in the case of different counties of the same state may with safety be permitted. Here the accused may have compulsory process for his witnesses, and a conviction in one county will be a bar to that in another. To extend its application to states is to attach to the crime of larceny penalties uncertain in their character,

possibly greatly incommensurate with the offense committed, and such as do not attend any other crime.

Conviction in one state is no bar to a conviction in another. For larceny committed in the state of Missouri, the thief bringing the goods here by way of Iowa, may be first tried here under this doctrine, and sentenced for ten years; the same in Iowa; and lastly convicted and sentenced in Missouri. So from the fear that the thief might escape justice altogether, we find a warrant to inflict upon him a triple penalty. I should prefer the ultimate escape of now and then a culprit than assume jurisdiction upon a theory which to me seems based on a fiction rather than on a clear and positive principle of law. The constitution of the United States has provided for cases where offenders fly from the state where the offense is committed. Wherever he is found he may be secured, and sent to that state for trial from which he has fled, on demand of the executive thereof. Under this provision, escape out of a state, while it may involve some inconvenience, need not defeat justice. If the legislature of this state, like that of some of the states, chooses to make the possession of stolen goods an offense, it would be proper for it to do so. I am of the opinion, therefore, that the judgment of the court below should be reversed and the prisoner discharged.

Judgment reversed.

CRIMES COMMITTED IN ONE STATE ARE NOT PUNISHABLE IN ANOTHER: See note to *Molynaux v. Seymour*, 76 Am. Dec. 672; *State v. Underwood*, 77 Id. 254, and note.

POLAND v. O'CONNOR.

[1 NEBRASKA, 50.]

SPECIFIC PERFORMANCE OF PAROL CONTRACT FOR SALE OF LAND WILL NOT BE ENFORCED unless a contract, clear, definite, and unequivocal in its terms is admitted by the answer or satisfactorily established by competent proof.

PAYMENT OF PORTION OF PURCHASE PRICE IS NOT PART PERFORMANCE taking parol contract for sale of land out of the statute of frauds.

TO TAKE PAROL CONTRACT FOR SALE OF LAND OUT OF STATUTE OF FRAUDS there must be unequivocal and satisfactory evidence of possession given and entered upon, or of acts clear, certain, and definite in their object, and having reference to the contract.

ACTS OF POSSESSION DONE AFTER VENDOR HAS DISAVOWED PAROL CONTRACT for sale of land, made by an unauthorized agent, are without warrant, and will not take the contract out of the statute of frauds.

POSSESSION TAKING PAROL CONTRACT FOR SALE OF LAND OUT OF STATUTE OF FRAUDS is not shown by proof that the vendee used the lot which adjoined his warehouse for storing lumber and wagons.

IT IS NOT EVERY POSSIBLE ACT OF VENDEE, DONE WITH REFERENCE TO PAROL CONTRACT for sale of land, that will remove it from the statute of frauds, but only those to which he has been induced by positive action or permission of the vendor; or at most by those results that naturally flow from the agreement.

PURCHASE OF BUILDING BY VENDEE IN PAROL CONTRACT FOR SALE OF LAND, with a view to placing it on the premises, will not take the contract out of the statute of frauds.

BILL in equity for specific performance of a parol contract for the sale of a lot of land in Omaha. The contract was made with one Clarke, who, the plaintiff claimed, was the defendant's agent, and who testified to his authority in this regard. The defendant, however, denied the authority of Clarke to sell the lot in question. The purchase price of the lot was one thousand dollars, according to the allegations of the plaintiff, who, upon being informed that Clarke had sold the lot to him, immediately sent to Clarke twenty-five dollars to be applied upon the purchase, and Clarke gave him a receipt stating that the deed would be made in ten days. Soon afterwards, and, as the defendant claimed, as soon as he was aware that the plaintiff contended that he had bought the lot through Clarke, the defendant disavowed the sale, and told the plaintiff that if he occupied the premises rent would be demanded. The bill was dismissed after hearing upon the pleadings and proofs, and the plaintiff appealed. In other respects the opinion states the case.

A. J. Poppleton, for the appellant.

J. M. Woolworth and E. Wakely, for the appellee.

By Court, **CROUNSE, J.** The bill was rightly dismissed.

The statute has said that no person shall be charged with the execution of an agreement relating to the sale of land who has not personally, or by his agent, signed a written agreement: R. S., sec. 62, p. 292. And when done by an agent, that the authority of such agent must also be in writing: Id., sec. 84, p. 297. The record shows no such case as should relieve the complainant from the operation of the statute.

1. The existence of a contract, clear, definite, and unequivocal in its terms, should have been admitted by the answer, or satisfactorily established by competent proof: Story's Eq.

Jur., sec. 764. Here, however, the very authority of the agent who assumed to sell the property is explicitly denied by the answer. To establish it, we have but the unsupported testimony of the real estate agent himself, whose interest, next to that of securing his fee, seems to have been to serve the purchaser rather than the vendor; to combine with the former in tying up and hurrying the transfer of the property from one to the other. Opposed to this is the testimony of the respondent in direct contradiction, affording a striking exhibition of the evils against which the statute was designed to provide. One of the most important objects of the statute was to prevent the introduction of loose and intermediate proofs of what ought to be established by solemn written contracts: *Id.*

2. Not regarding the contract as established, has there been such a part performance of it as entitles the complainant to the relief sought? The payment of the twenty-five dollars does not affect it: *Clinan v. Cooke*, 1 Schoales & L. 40; Story's Eq. Jur., sec. 760; 2 Parsons on Contracts, 552. Neither is there such unequivocal and satisfactory evidence of possession given and entered upon, or of any acts clear, certain, and definite in their object, and having reference to the contract made, as is required. Under the contract relied on, a deed was to be given in ten days. At the expiration of this time, Poland was advised that O'Connor disavowed the agreement of Clarke, and of his refusal to make a deed. What Poland may have done subsequently to that time, therefore, was without warrant, and defiantly.

The proofs leave it quite uncertain as to what acts of possession, if any, transpired under the agreement during that time. From the testimony of Poland, it appears that the vacant lot in question adjoining the warehouse of himself and partner, Patrick, was used subsequently to the time of agreement for storing lumber, wagons, and like articles of himself, the firm and others held on commission. It is quite probable that not only during the ten days, but both prior and subsequent thereto, such use would be made of an unoccupied lot adjoining a warehouse. This is far short, however, of that improvement, that open, visible, and unequivocal possession under the contract necessary to take the case out of the statute: *Fry on Specific Performance of Contracts*, sec. 403, p. 237.

As to the purchase of the house to put upon the lot, it may be remarked that the defendant is not to be bound by every possi-

ble act of the complaining party done with reference to the contract. He should be affected by those only to which he has been induced by positive action or permission of the vendor; or at most by those results which naturally flow from the agreement. He certainly should not be concluded by the folly of the vendee.

Here possession was not an expressed part of the agreement. It does not appear that the purchase of this lot was for the purpose of erecting or building thereon, much less with the design of moving one already constructed thereon. The building in fact never was moved on the premises. It is not shown to be lost or depreciated in value. No damage of any character appears to have resulted from its purchase. Still, had the investment proved an entire loss, the complainant's conduct has not been such as to challenge the consideration of a court of equity. To purchase a valuable lot through a real estate agent who can show no authority with the owner of the property living on the next block; to pay but the amount of the agent's fee as earnest; and in the next hour to purchase a building ready constructed to place thereon without consent of or conference with the vendor,—is an attempt at sharpness or an exhibition of folly which courts do not favor.

The decree of the court below is affirmed.

Decree affirmed.

COURT WILL DECREE SPECIFIC PERFORMANCE OF CONTRACT within the statute of frauds, where parol agreement has been partly executed: See *Ryan v. Dox*, 90 Am. Dec. 696, and note.

PART PERFORMANCE OF PAROL AGREEMENT which will take case out of the statute of frauds: See *Ryan v. Dox*, 90 Am. Dec. 696, and note 708, citing other cases. Payment of a small portion of the purchase price is not such a part performance as will take the contract out of the statute of frauds: *Baker v. Wiswell*, 17 Neb. 58, citing the principal case. Part performance on the part of the vendor, including the delivery of possession, and full performance on the part of the vendee, is sufficient to take a parol contract for the conveyance of real estate out of the statute of frauds, and to authorize a decree for the specific performance of such contract: *Hanlon v. Wilson*, 10 Id. 140, citing the principal case.

SANDS v. SMITH.

[1 NEBRASKA, 108.]

WHERE AGREEMENT FOR LOAN OF MONEY IS MADE IN NEW YORK, and the money there advanced, a note payable in New York, and given as security pursuant to the terms of the agreement, though made in Nebraska, is a mere incident of the agreement, and is governed by the laws of New York; and therefore it may be void by reason of the usury laws of that state, though valid according to the laws of Nebraska.

ACTION upon a promissory note dated at Omaha, Nebraska, and payable in New York, and for the sum of five thousand dollars, with interest at twenty-one per cent per annum. The defendant answered, setting out the usury laws of New York, which make void securities given for a loan of money with interest at a rate higher than seven per cent per annum. He also alleged that an agreement for the loan of five thousand dollars was made between plaintiff and defendant in New York, by the terms of which, interest at the rate of twenty-one per cent per annum was to be paid upon the amount loaned, and a note and mortgage executed as security therefor; that, pursuant to the agreement, the note in suit and a mortgage upon lands in Nebraska were executed and delivered to the plaintiff, who thereupon advanced and paid over to the defendant the sum of five thousand dollars in New York. No reply was filed, and the cause being tried on the pleadings, judgment was rendered for the plaintiff, the interest being computed at seven per cent per annum; whereupon the defendant filed his petition in error.

J. M. Woolworth, for the plaintiff in error.

Redick and Briggs, for the defendant in error.

By Court, CROUNSE, J. From the pleadings as presented by the record, there is no question but that the agreement for the loan of money expressed in the note in suit, with its terms as to rate of interest, time and place of repayment, was made in the state of New York, and the money there advanced. The circumstance that the note was made in Omaha, Nebraska, where at the time there was no limit to the amount of interest that might be agreed upon by the parties, is relied on to save the note from being declared void under the laws of New York relating to usury, as set out in the answer of the defendant in the court below. This, it is contended, makes it a case where the contract is entered into at one place to be

performed in another, giving the parties liberty to contract for the highest rate of interest allowed by the laws of either.

The fallacy of this argument consists in compounding the contract with the note. It is distinctly charged that the note was executed in pursuance of the agreement made in New York. When that agreement was made, and the money there paid over, the rights and obligations of the respective parties attached; the note was but evidence of the agreement. Had the note expressed but lawful interest of New York, with the understanding between the parties that the remaining fourteen per cent interest was to be paid as fixed upon when the law was made, the note would be so related to the contract that because of the illegality of the original agreement, no action could be maintained in New York upon it: *Merrills v. Law*, 9 Cow. 65; *Macomber v. Dunham*, 8 Wend. 550; *Hammond v. Hopping*, 13 Id. 505. So, on the other hand, had the agreement in New York been for lawful interest, a note given subsequently expressing a greater interest would be declared void, while the original agreement would stand: 2 Parsons on Contracts, 4th ed., 392.

These illustrations are given to show that the original agreement is to be considered in the solution of questions of this character. The note is but an incident. In *Hosford v. Nichols*, 1 Paige, 220, where a contract for the sale of land in New York was made between two citizens of New York, one of whom removed to Pennsylvania, where the contract was afterwards executed by giving a deed, and taking a mortgage of the premises to secure the payment of the purchase-money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was held that the giving the deed and taking the mortgage was only a consummation of the original contract made in New York, and that the mortgage was not void for usury.

Here, then, we have a contract both made and to be performed in the state of New York, and being void by the laws of that state must be so here.

The cases urged upon the attention of the court by the counsel for defendant in error have no application. *Depau v. Humphreys*, 8 Martin, N. S., 1, is a case where a note was given in New Orleans, payable in New York, with the legal interest of Louisiana, being ten per cent, while that of New York is but seven. There it was held by the supreme court of Louisiana that the contract being made in Louisiana, and to be

performed in New York, the parties might stipulate for the interest of either state. This case is sustained by *Pecks v. Mayo*, 14 Vt. 33 [39 Am. Dec. 205], and *Chapman v. Robertson*, 6 Paige, 627 [31 Am. Dec. 264], while it has the disapproval of Justice Story: *Conflict of Laws*, sec. 298.

Having concluded that in the case under consideration the contract was not made in Nebraska, it is unnecessary to consider the case just cited.

The contract of the parties being void by the laws of New York, no action will lie here on the note given under it.

The judgment of the court below must be reversed.

PROMISSORY NOTES ARE GOVERNED BY LAW OF PLACE WHERE THEY ARE PAYABLE: *Lewis v. Headley*, 87 Am. Dec. 227, and note 230.

McREADY v. ROGERS.

[1 NEBRASKA, 124.]

VERDICT CANNOT OPERATE AS ABATEMENT OF ACTION unless rendered in a suit for the identical cause of action, and between the same parties.

VERDICT CANNOT OPERATE AS RES JUDICATA, for not until judgment does a matter become *res judicata*.

SEVERAL WRONG-DOERS MAY EACH BE SEPARATELY PROCEEDED AGAINST TO JUDGMENT, although but one satisfaction can be had.

LIABILITY OF SURETY ON ATTACHMENT BOND IS SEVERAL AS RESPECTS OBLIGEE in another attachment bond given in another suit against the same defendant in which the same property is attached, and if the attachment is wrongful, each may be proceeded against to judgment, although but one satisfaction can be had.

GENERAL EXCEPTION TO INSTRUCTION IS UNAVAILING IF IT INVOLVE MORE THAN SINGLE PROPOSITION, and any portion of it be correct; but in such case each portion of it which is claimed to be erroneous must be specifically excepted to.

SURETY ON ATTACHMENT BOND IS LIABLE IN CASE OF WRONGFUL ATTACHMENT for all damages suffered by the defendant up to the redelivery of the property; and therefore he is liable for the neglect or refusal of the sheriff to return the property upon the dissolution of the writ, notwithstanding the sheriff may be also liable.

DEFENDANT UPON DISSOLUTION OF ATTACHMENT IS ENTITLED TO RETURN OF PROPERTY WITHOUT REIMBURSING SHERIFF for charges paid a carrier to get possession of it or for expenses incurred in storing it.

ACTION by McReady, who had been the defendant in an attachment suit, against Rogers, who was a surety in the attachment bond, to recover damages, the attachment having been dissolved on the ground that McReady had not disposed of his property with fraudulent intent, as averred in the affidavit for

attachment. At the trial the defendant sought to introduce in evidence a verdict of a jury obtained by the plaintiff against one Kennard, and to establish that Kennard had brought an attachment suit against the plaintiff, and had levied his writ upon the property in question prior to the levy of the writ in controversy; that Kennard's writ had been dissolved, and that the verdict against him covered all the damages suffered by the plaintiff from its wrongful issuance and levy; but the court excluded the evidence. When the attachment was levied the property was held for unpaid freight by the Chicago and Northwestern Railway Company, and in order to get possession of it, the sheriff paid these charges; and he also incurred other expenses in storing it. And in this regard the court charged that upon the dissolution of the attachment the plaintiff was entitled to the return of the property, without reimbursing the sheriff for these expenses, and also that the defendant was liable for all damages suffered by the plaintiff by reason of the wrongful withholding of the property by the sheriff upon this pretext, whether before or after the dissolution of the attachment. Verdict and judgment for the plaintiff, and petition in error by the defendant.

C. S. Chase, for the plaintiff in error.

E. Wakely, for the defendant in error.

By Court, CROUNSE, J. Among the errors assigned and chiefly relied on by the counsel for the plaintiff in error are: 1. The rejection of testimony offered by him in the court below showing a verdict obtained at the same term of court against other parties, and in favor of the defendant in error, in which was included the same interest sought to be recovered in this action; and 2. Permitting the jury to consider damages arising from detention of the attached property by the sheriff subsequent to the dissolution of the attachment.

As to the first, I cannot understand upon what principle such proof would have been material. Certainly not to effect an abatement of this action; for this purpose, the offer must have been to show a suit for the identical cause of action and between the same parties. Not as *res judicata*, for the like reason that neither the parties nor subject-matter are identical; and the further reason that not until judgment has a matter become *res judicata*.

Regarding Rogers as one of several wrong-doers in at-

taching the property of McReady, the rule is, that each may be proceeded against separately, although but one satisfaction can be had: *Livingston v. Bishop*, 1 Johns. 290 [3 Am. Dec. 330]. But treating Rogers as a debtor under his bond, as was so pertinaciously insisted upon by the counsel (and the concession is here made for the argument), rather than as a wrong-doer, his obligation is several as respects Kennard. His attachment is a distinct proceeding subject to settlement, continuance, and other incidents independent of that of Kennard or others. Still, as one of a number severally liable for the same debt, he, like each of the others, may be proceeded against to judgment, although but one satisfaction could be had. Even where the obligation is joint and several, judgment (without satisfaction) is no bar to a recovery against another: *Brown v. Wooton*, Cro. Jac. 74; *King v. Hoare*, 13 Mees. & W. 504; *Simmons v. Carter*, 6 Mass. 18.

The difficulty is, that the counsel at the time of his offer was anticipating a condition of the several cases which had not then transpired,—the perfection and satisfaction of judgment against Kennard upon the verdict which was then standing upon the records of the court. McReady in this action was entitled to but his actual damages arising from the interference with his property and credits. If, as to any parts of those sued for in this action, he had been satisfied, he would have been allowed to show it. The introduction of a verdict simply is not sufficient. Too many contingencies intervene between that and the realization of the amount it expresses. It may be set aside, the judgment on it may be reversed, or the defendant may be worthless. Nothing short of its satisfaction could avail the defendant below; and this he might show on proper application even after judgment against him.

As to the second point relied on by the plaintiff in error, it would be sufficient to remark that he is not in a condition to take advantage of the supposed error. The bill of exceptions shows so much of the charge of the judge on the trial below as involves several propositions of law, some of which are conceded to be correct. The exception taken by the counsel at the trial is, "to all and each and every part thereof." This firing at the flock will not do.

It is a well-established point of practice that when the charge of the court involves more than one single proposition, a general exception to it will be unavailing, and if any portion of it be correct, the whole will stand. Each specific portion of

it which is claimed to be erroneous must be distinctly pointed out, and specifically excepted to: See 2 Whittaker's Practice, 3d ed., p. 364, citing scores of cases. Nevertheless, let us briefly notice the point contended for by the counsel.

It is claimed by him that on the dissolution of the attachment it was the duty of the sheriff to return the property to McReady, and that for his neglect or refusal so to do Rogers is not responsible,—that the sheriff alone is liable from that time. That Rogers, as surety in the attachment suit, is responsible for all damage up to the discharge of the attachment, is conceded. Upon what principle he is then to be relieved I cannot discover. The plaintiff in that suit, representing that McReady had assigned and disposed of his property with intent to defraud his creditors, procured an attachment. Subsequent proceeding showed these representations to be false, and the attachment was discharged. Thereupon they stand as though no process against McReady's property had ever issued, and become trespassers *ab initio*: *Lyon v. Yates*, 52 Barb. 237. They, through their instrument or agent, the sheriff, took McReady's property without his consent and against his will, and it was their duty to return it, and place him in as good condition as before the taking. It is true that McReady might, as he did, demand the property of the sheriff after the dissolution of the attachment, and have his action against him not officially, but as against any trespasser wrongfully detaining it, upon his refusal to deliver it up; still, the liability of the plaintiff in the attachment, or that of Rogers as his surety, is none the less. The contrary rule might prove very damaging. Property of great value, far in excess of the ability of the sheriff, or the amount of his official bond, might, upon a proper and sufficient undertaking being given, be attached and passed into the hands of the sheriff. The condition of the defendant would be quite unfortunate if the sheriff should willfully dispose of or refuse to return the property,—the plaintiff, by the sheriff's conduct, being relieved from any liability under his bond.

It remains to notice whether the reason assigned for not re-delivering the property be sufficient. The property having been wrongfully taken, it follows that any charges paid to get possession of it, or in its keeping, were voluntary and without warrant, and therefore repayment could not be made a condition upon which a return of the property depends.

The judgment must be affirmed.

Judgment affirmed.

LIABILITY OF SURETIES ON ATTACHMENT BOND, AND FOR WRONGFUL ATTACHMENT: See the extended note to *Burton v. Knapp*, 81 Am. Dec. 467 et seq.

SEVERAL ACTIONS MAY BE BROUGHT and several judgments recovered against several wrong-doers, but only one satisfaction can be had: *Jameson v. Barber*, 56 Wis. 637, citing the principal case. See an extended treatment of this subject in the note to *Kirkwood v. Miller*, 73 Am. Dec. 137-149.

EACH SPECIFIC PORTION OF CHARGE which claimed to be erroneous must be distinctly pointed out and specifically excepted to: *Strader v. White*, 2 Neb. 360, 368; *Dodge v. People*, 4 Id. 230. Where there are several propositions included in the charge which are undoubtedly correct and entirely applicable to the case, and the exception goes to the whole charge, it cannot be sustained: *Meyer v. Midland Pacific R. R. Co.*, 2 Id. 335, all citing the principal case. See also *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 699, and cases cited in the note 706.

FILLEY v. DUNCAN.

[1 NEBRASKA, 134.]

PARTY WILL BE PRESUMED TO HAVE INTEREST IN LAND that he could sell or assign, and which a court of equity would recognize and protect in the hands of his vendee or assignee, where at the time of the contract of sale he was in possession, cultivating the premises, and afterwards acquired a complete legal title.

VENDOR WHO CONTRACTS TO CONVEY ESTATE WHICH HE HAS NOT at the time will be compelled to specifically perform his contract if he afterwards becomes the owner.

NO LIEN UNDER JUDGMENT ATTACHES TO AFTER-ACQUIRED LANDS so as to affect *bona fide* purchasers, until levy of execution.

LIEN OF JUDGMENT IS SUBJECT TO ALL EQUITIES that exist at the time of its recovery.

PURCHASER FROM VENDOR WITH NOTICE TAKES SUBJECT TO EQUITIES OF VENDEE, and this notice may be actual personal notice, or it may arise from open and notorious possession of the land by the vendee.

LIEN OF JUDGMENT RECOVERED AGAINST VENDOR OF LAND attaches only to his interest in it, and while the contract of sale subsists extends only to the unpaid balance of the purchase-money.

ENTRY OF JUDGMENT AGAINST VENDOR OF LAND IS NOT CONSTRUCTIVE NOTICE to vendee in possession, and subsequent payments to the vendor are not at his peril.

ACTUAL NOTICE GIVEN BY JUDGMENT CREDITOR TO VENDEE of the entry of his judgment against the vendor will not, it seems, make subsequent payments by the vendee to the vendor payments at his peril. *Per Crounse, J.*

JUDGMENT CREDITOR WHOSE LIEN ATTACHES TO UNPAID PURCHASE-MONEY on a contract of sale may, by a proceeding in the nature of a creditor's bill, enjoin subsequent payments by the vendee until the rights of the parties are determined.

RULE THAT PURCHASER AT SHERIFF'S SALE BECOMES POSSESSED OF TITLE and interest of judgment debtor at the time of the entry of judgment
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is subject in equity to the qualification that he takes the title subject to the equities then existing against the judgment debtor, or which have since arisen through want of knowledge of the judgment.

WHERE JUDGMENT IS RECOVERED AGAINST VENDOR OF LAND OF WHICH VENDEE IS IN POSSESSION, and the land is sold under the judgment, the vendee who has without notice of the judgment completed his purchase, and received a deed from his vendor before the sheriff's sale, may sustain a bill in equity to have the sheriff's deed declared void, and the possession of the premises decreed to the plaintiff.

BILL in equity to have sheriff's deeds declared void, and the possession of the premises awarded to the plaintiffs. One Francis Bell, being in possession of the premises in question, and owning one undivided half thereof, contracted with Mrs. Duncan to sell to her the whole tract, and to convey the same as soon as he should acquire the whole title, she to pay a certain amount down and the balance upon the execution of the deed; and under this contract Mrs. Duncan entered at once into possession, and subsequently paid all of the purchase price except \$512. On the 28th of May of the next year, 1860, Bell, having acquired the title to the whole tract, conveyed to Mrs. Duncan, and received the balance due on the purchase price. In 1859, at the December term of the district court, one Hills recovered judgment against Bell, which he assigned to the defendant Filley. In August, 1861, execution issued thereon, under which the south half of the premises was sold, Filley becoming the purchaser and receiving a sheriff's deed. At the same term the defendant Hopkins also recovered judgment against Bell, and in October, 1860, had an execution issued thereon, under which the north half of the premises was sold, he becoming the purchaser, and in due course receiving a sheriff's deed. It was not shown that Mrs. Duncan was aware of these judgments until after she had paid the whole of the purchase-money and received her deed from Bell; but both of the defendants knew of her interest in the premises. In October, 1860, Mrs. Duncan died, leaving a husband and three children, the plaintiffs in this suit. After his wife's death, and until 1863, Mr. Duncan remained in possession of the premises, and then left the territory, after intrusting the premises to the care of a friend. And soon after his departure the defendants Filley and Hopkins entered into possession, which they retained at the time this suit was commenced. The cause was heard upon the pleadings and proofs, and a decree rendered in accordance with the prayer of the petition, whereupon the defendants appealed.

Shambaugh, for the appellant.

Croxton, contra.

By Court, CROUNSE, J. At the time of making the contract of sale of the lands in question with Mrs. Duncan, Bell, it is conceded, was the owner of the undivided one half thereof. He was in possession of the premises, and agreed to convey the entire fee when he should receive deeds from certain heirs. What his interest was to this remaining one half does not appear. The circumstance that he was in possession, — cultivating the premises being of itself *prima facie* evidence of title, — and the further fact that he did receive quitclaim deeds from the heirs, make it quite certain that he had some right to this remaining one half. The conveyances received by him were simple releases, and of themselves do not indicate the interest conveyed by them. If there was an entire want of interest in Bell to this part, it devolved upon those who claim an advantage by reason of it to show the fact affirmatively. It is safe to presume that Bell had such an interest as he could sell or assign, and which a court of equity would recognize and protect in the hands of his vendee or assignee. "It is extremely clear," says Story, "that an equitable interest, under a contract of purchase of real estate, may be the subject of sale. A purchaser claiming under such original contract, in case he afterwards sells his purchase to sub-purchasers, becomes in equity a trustee for the persons to whom he contracts to sell": 2 Eq. Jur. 1050.

Where there is a contract to convey an estate which the vendor has not at the time, if he afterwards become the owner, a court of equity will compel a specific performance: *Edwards v. Varick*, 5 Denio, 664, *per* Porter, senator, 695. So when Bell completed his title by securing the deeds from the heirs, it was in fact for the benefit of Mrs. Duncan; and the transaction is so related to the contract with her that, in my opinion, her rights to this after-acquired title are the same as to that about which there is no dispute. However this may be, the lands in question were not levied upon under these judgments until Bell had conveyed by deed to Mrs. Duncan; and as to after-acquired lands, no lien attaches so as to affect *bona fide* purchasers until levied upon: Code, 477; *Roads v. Symmes*, 1 Ohio, 281, 313. For the purposes of this case, therefore, it may be assumed that, at the time of making his contract with

Mrs. Duncan, Bell was the absolute owner of the land bargained to her.

The position of Mrs. Duncan in July, 1859, when she had made her contract with Bell, was this: She was the purchaser from the owner in fee of the land in question; she was in possession of and cultivating the same; and on making payment according to the terms of her contract, was to receive a good and sufficient deed. The transaction was a lawful and a usual one, and entered into in good faith.

The judgments under which Hopkins and Filley, the appellants, claim, were entered in December following, and before the execution of the deed from Bell to Mrs. Duncan, which was on the twenty-eighth day of May, 1860.

The lands and tenements of the debtor are bound for the satisfaction of a judgment against him from the first day of the term at which it is rendered: Code, 477. But it is well settled that in equity the lien of a judgment is subject to all equities that existed at the time it was recovered: *Mayor v. Hinman*, 13 N. Y. 180, 190; *In the Matter of Howe*, 1 Paige, 125; *Ellis v. Tousley*, 1 Id. 280; *White v. Carpenter*, 2 Id. 217; *Keirsted v. Avery*, 4 Id. 9; *Parks v. Jackson*, 11 Wend. 442 [25 Am. Dec. 656]. It is true, an agreement for the sale of lands is a personal contract; it does not attach to the lands sold, nor divest the vendor of his estate. The legal title still remains in him, and he can convey to a *bona fide* purchaser, without notice, a title to the premises, freed from the equity of the vendee. But while this is so, a purchaser with notice would take the premises, subject to the equitable rights of a vendee. This notice may be actual personal notice, or it may arise from open, notorious possession of the lands by the vendee, which is constructive notice to all the world: *Gouverneur v. Lynch*, 2 Paige, 300; *Chesterman v. Gardner*, 5 Johns. Ch. 29 [9 Am. Dec. 265]. The lien of these judgments went no further. They attached to the interest of the vendor, Bell, as they found it. Had the vendee abandoned the contract, the entire fee in the vendor would have become subject to the lien of the judgments; and the purchaser at sheriff's sale under them would have received a clear title to the lands so sold. With the contract subsisting, the lien extended only to the unpaid balance of the purchase-money. To the extent of \$512 remaining unpaid upon Mrs. Duncan's contract, these judgments were a lien, which could have been made available to these judgment creditors in a proper proceeding.

Subsequent to the entry of these judgments, and before sale of the premises under them, Mrs. Duncan paid this balance of the purchase-money to Bell, and took a deed from him. No actual notice to her of the entry of these judgments, nor claim upon her for the balance of the purchase-money, is shown. But it is claimed that the record of these judgments was constructive notice to her, and that any payment by her to Bell after this entry was in her own wrong, and not to the prejudice of these judgment creditors. In support of this position, counsel refer to *Gouverneur v. Lynch*, 2 Paige, 300. All that is there said by the chancellor on this point is: "If a vendee is in possession of land under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity. If the purchase-money has been paid before notice of or prior to the recording of a subsequent mortgage, the mortgagee will have no claim upon the land. Where a part remains unpaid, he will have an equitable lien thereon to the extent of the unpaid purchase-money." This case and the others cited by counsel under this head, while they assert the principle assumed in this case, that these liens in equity extend no further than to the unpaid purchase-money, do not declare the doctrine contended for here. In my examination I have met with but one case supporting the view taken by the counsel for the appellants: *Mayor v. Hinman*, 17 Barb. 137. In 1835, one Schroepel, being the owner of certain lands, contracted to sell them to Mayor. In 1838 a judgment was recovered against Schroepel, which became a lien upon the premises, and upon which they were sold in 1844. In January, 1846, a sheriff's deed was given to Hinman as assignee of the sheriff's certificate. Payments were made to Schroepel by Mayor after the recovery of the judgment and before the sheriff's sale. After the sale, and before the deed was given, viz., in October, 1845, Mayor made a further payment to Schroepel. It was held that the judgment against the vendor was a charge upon the land binding the legal title,—the lien being restricted in equity to the amount of the unpaid purchase-money. It was further held that no notice to Mayor of the judgment or sheriff's sale was necessary to protect the legal title and claim of Hinman; and that Mayor had no right to make payments to Schroepel in October, 1845, and was not entitled to have the same credited upon his contract as against the title and claim of Hinman.

under the judgment. The judge delivering the opinion of the court says, as to the vendee: "His real equity consists in having parted with his money upon the faith of his contract and before an adverse legal title had accrued, or legal lien attached; and not in having parted with his money subsequently, without making an effort to discover the then state of the legal title and the rights of parties."

This case was taken to the court of appeals (*vide Mayor v. Hinman*, 13 N. Y. 180), and there reversed as to so much as holds that the record of a judgment is sufficient to insure the payment of the balance of the purchase-money from vendee to judgment creditors. Judge Denio, delivering the opinion of the court, after assuming the law as fully established that one in possession under contract of purchase is to be protected in equity as to his rights which existed at the time of docketing a judgment, says: "I consider it equally well settled that the docketing of a judgment against the vendor affords no notice of its existence, either actual or constructive, to the prior vendee of the judgment debtor. Parties who deal with the debtor respecting his lands subsequently to the docketing of the judgment are affected with notice. Such persons may make themselves perfectly safe in that particular by searching the docket-book of judgments in the proper office; and they will of course abstain from purchasing if they find the land which they are proposing to buy encumbered by a judgment. So it may be said a party holding a contract upon which payments remain to be made, may, before making such payments, examine for judgments against the vendor; but it would be an intolerable inconvenience to require this, where the payments, as is usually the case, are to be made annually or oftener; and should such examinations be ever so strict, the vendee would have to run the risk of an encumbrance intervening while he was going from the office where the search was made to the residence of the vendor to make the payment. It has been repeatedly decided that the docketing of a judgment or the recording of a mortgage is no notice to a prior purchaser or mortgagee of the premises whose conveyance is on record, or of which notice was had; the object of the recording acts, and of the law requiring judgments to be docketed, being, it is said, to protect subsequent purchasers and encumbrancers against previous deeds, mortgages, etc., which are not recorded, and of which they had no notice, and to deprive the holder of the prior unregistered conveyance or mortgage,

of the right which his priority would have given him at common law: *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *Stuyvesant v. Hall*, 2 Barb. Ch. 151.

"The plaintiff (Mayor) in this case being in possession under his contract, that circumstance was notice to all persons who might subsequently become interested in any way in the premises, not only of such possession, but of the terms of the contract, and of all his existing rights under it.

"In the view of a court of equity, his condition was like that of a party having a prior conveyance or lien which was duly recorded. . . . The vendee having no notice of the judgment creditor's lien, and the creditor having full notice of the vendee's situation, it would seem to be reasonable that, in order to intercept those payments and divert them from the vendor's hands to his own, the creditors ought at least to inform the vendee of the existence of his lien and his right to the unpaid purchase-money."

The case of *Parks v. Jackson*, 11 Wend. 442 [25 Am. Dec. 656], cited with approval in the last-mentioned opinion, is a strong authority in point. Parks, the plaintiff in error, was in possession of a tract of land which had been purchased by one of these executory contracts, and possession had been taken by the vendee upon the contract being executed, which was continued down to the time the controversy arose. Judgments were recovered against the devisee of the vendor, and afterwards the party holding under the vendee, without actual notice of the judgments, paid the whole purchase-money, took a conveyance, and conveyed to Parks. Then the judgment creditor sold the land on the judgment, obtained a sheriff's deed, and brought ejectment against Parks. The court of errors held that the plaintiff could not recover. The purchase-money for the land was paid to, and the deed under which Parks held was executed by, one Henry Franklin, to whom the devisees of the original vendor had conveyed the premises, and the judgments under which the plaintiff in the ejectment suit claimed were against the devisees. The judgment creditors claimed that the conveyance to Henry Franklin was void as against the creditors of the grantors, and commenced a suit in chancery against the parties to that conveyance, and obtained a decree setting it aside for the alleged fraud, having at the time of filing the bill filed a notice of *lis pendens* in the county clerk's office. The payments were made, and the deed under which Parks held was given pending the suit. It was

scarcely contended that the docketing the judgment against the grantors of Henry Franklin would alone enable the creditors to question the payments subsequently made; but it was insisted that the *lis pendens* affected the parties holding under the vendee in the executory contract, and that the payments were consequently made in their own wrong. The court, however, held that neither the judgments nor the *lis pendens*, nor both of them, affected the vendees, or impaired the effect of the payments made or the deeds under which Parks held.

In Maryland, in the case of *Hampson v. Edelen*, 2 Har. & J. 64 [3 Am. Dec. 530], it was held that where a vendee, subsequently to the recovery of a judgment against the vendor, but without actual notice thereof, had paid over the balance of the purchase-money and taken a conveyance from the judgment creditors, such vendee was, in equity, entitled to be protected against the claim of the judgment creditors.

These latter cases, besides challenging the consideration due to so high authority, are based on the better reasoning. The conclusions reached are deduced from doctrines so fully established by authority as to entitle them to be regarded as among the elementary principles of the law; and when applied here, afford an easy solution of this case. At the time of the entry of the judgments under which Hopkins and Filley claim, Mrs. Duncan had made a contract with Bell for the premises in question, and had parted with a part of the purchase price. At the time of her purchase there was no suggestion of right or interest to the same in these parties, either actual or constructive. She took the hazard of the vendor's title, and relied upon his responsibility to make her a deed in due time. She also ran the risk of prior judgments against the vendor, and at her peril was bound to search the records for incumbrances prior to the date of her contract. Her possession was notice to all the world of her interest. She was the equitable owner of so much at least as had been paid for, and was entitled to a conveyance of the whole of the lands when the balance of the money should be paid. She had obligated herself to pay Bell the balance; and to assume to pay any one else might embarrass her, or lead to litigation with Bell, or those to whom he might assign his contract with her. These judgment creditors came into this arrangement rather as intruders. They are given a right to the unpaid purchase money, which, in a proper proceeding, may be secured by

them. To this extent they are to be benefited, and it is but right that as to this they should become the actors.

They should at least have given Mrs. Duncan or her representatives actual notice of the entry of their judgments and their claim under them. Whether a simple notice to the vendee of the existence of judgment liens acquired since her contract would be sufficient to make any further payments to the vendor, the judgment debtor, at her own peril, it is unnecessary to decide. In my opinion, however, it is not. In a proceeding in the nature of a creditor's bill, payment could be enjoined until the rights of the parties are determined. The party who seeks to interfere with and override a lawful transaction, and intercept payments due under legal obligations, and have the same applied in satisfaction of his claims, should, it seems to me, provide himself with authority from some competent power.

Here Mrs. Duncan, pursuant to her agreement, has paid all of the purchase-money, and taken a deed; and her heirs now ask that the title so taken be cleared from the cloud raised by the sale of these premises under the judgments mentioned. To this relief they are entitled. When the sheriff's sale was made, no title remained in Bell, and of course no title passed. Bell had already conveyed to Mrs. Duncan. The rule that the purchaser at sheriff's sale becomes possessed of the title and interest held by the judgment debtor at the time of the entry of judgment is subject in equity to this qualification: that he takes such title subject to the equities that then existed against him, or which have since arisen through want of knowledge of such judgments.

Judgment of the court below affirmed.

ESTATES AND INTERESTS AFFECTED BY JUDGMENT LIEN. — *Nature of Judgment Lien.* — A judgment does not constitute a specific lien upon any particular real estate belonging to the judgment debtor, but is a general lien upon all of his real estate, attaching simply to his interest therein, and in some states only to his legal interest, and subject to all prior liens, whether legal or equitable: Freeman on Judgments, sec. 338; *Rodgers v. Bonner*, 45 N. Y. 379; *Indiana School Dist. v. Werner*, 43 Iowa, 643; *Wilson v. Wilson*, 3 Del. Ch. 183. In the first instance, the lien of judgments existed only by virtue of statute, the ancient and original statutes being the statute *de mercatoribus*, and the statute of Westminster giving the writ of *elegit*: Bac. Abr., tit. Executions. But though judgment liens are usually provided for by the statutes of the several states in this country, "the lien undoubtedly existed by virtue of certain English statutes [such as the above] so anciently adopted as to be regarded as a part of our common law, and also by virtue of other English

statutes subjecting to execution lands situate in the colonies": Freeman on Judgments, sec. 339, and cases cited. The lien results from the liability of the real estate to be taken and sold, delivered, or extended in satisfaction of the judgment, and exists only where that liability exists: *Coombs v. Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236. And it is also confined to realty, for by the statute of frauds, goods and chattels are not bound until the delivery of the execution to the sheriff: *Coombs v. Jordan, supra*; *Witmer's Appeal*, 45 Pa. St. 455; S. C., 84 Am. Dec. 505; *Dunham v. Cox*, 10 N. J. Eq. 437; S. C., 64 Am. Dec. 460; see *Adams v. Hudson County Bank*, 10 N. J. Eq. 535; S. C., 64 Am. Dec. 469; *Sellers v. Corwin*, 5 Ohio, 398; S. C., 24 Am. Dec. 301. And therefore the lien of a judgment without a levy does not prevent emblements from passing to the executor on the debtor's death as personalty: *Coombs v. Jordan, supra*.

ATTACHES TO ACTUAL, NOT APPARENT, INTEREST OF JUDGMENT DEBTOR. — The lien of a judgment attaches to the precise interest of the judgment debtor in the land. In some states it is confined to the legal interest of the debtor; but whether it extends to the legal and equitable interest, or is restricted to the legal interest only, it is the actual and not the apparent interest of the defendant that is affected, and his apparent interest "can neither extend nor restrict the operation of the lien so that it shall encumber any greater or less interest than the debtor in fact possesses": Freeman on Judgments, sec. 356; *Berkley v. Lamb*, 8 Neb. 399; *Colt v. Du Bois*, 7 Id. 391, citing the principal case; *Unknown Heirs v. Kimball*, 4 Ind. 546; S. C., 58 Am. Dec. 638; *Union Bank v. Maynard*, 51 Mo. 548; *Sandford v. McLean*, 3 Paige, 117; S. C., 23 Am. Dec. 773; *Ellis v. Tousley*, 1 Paige, 280; *Morris v. Mowatt*, 2 Id. 586; S. C., 22 Am. Dec. 661; *Ex parte Trenholm*, 19 S. C. 126; *Blankenship v. Douglass*, 26 Tex. 225; S. C., 82 Am. Dec. 608; *In re Estes*, 6 Saw. 459. And therefore, where the judgment is a lien upon equitable interests, it matters not that the evidences of the debtor's interest are not of record: *Lathrop v. Brown*, 23 Iowa, 40; *Logan v. Herbert*, 30 La. Ann., pt. 1, p. 727; *Richter v. Selin*, 8 Serg. & R. 425; *Niantic Bank v. Dennis*, 37 Ill. 381. And on the other hand, though he seems to have an interest, if he have none in fact no lien will attach: *Churchill v. Morse*, 23 Iowa, 229; *Uhl v. May*, 5 Neb. 157; *Holden v. Garrett*, 23 Kan. 98; *Lombard v. Abbey*, 73 Ill. 177; *Doswell v. Adler*, 28 Ark. 83; Freeman on Judgments, sec. 357; for the lien can extend no further than the debtor has power voluntarily to transfer or alienate the lands in satisfaction of his debt; *Coombs v. Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236; and the rights of a lien-holder cannot exceed those which might be acquired by a purchase from the defendant with full notice of all existing legal or equitable rights belonging to third persons: *Baker v. Morton*, 12 Wall. 150.

Lien Subject to Equities of Third Persons. — And therefore a judgment lien on the land of the debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment; and courts of equity will protect such equities against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate: *Blankenship v. Douglass*, 26 Tex. 225; S. C., 82 Am. Dec. 608, and note 612, 613; *Coombs v. Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236; *Sweet v. Jacocks*, 6 Paige, 355; S. C., 31 Am. Dec. 252; *Buchan v. Sumner*, 2 Barb. Ch. 165; S. C., 47 Am. Dec. 305; *Coster's Ex'r v. Bank of Georgia*, 24 Ala. 37, 64; *Wharton v. Wilson*, 60 Ind. 591; *Ellis v. Tousley*, 1 Paige, 280; *Morris v. Mowatt*, 2 Id. 586; S. C., 22 Am. Dec. 661; *Walke v. Mooly*, 65 N. C. 599; *Frazer v. Thatcher*, 49 Tex. 26; *Floyd v. Harding*, 28

Gratt. 401; *Goodell v. Blumer*, 41 Wis. 436; *Brown v. Pierce*, 7 Wall. 205; *Whitworth v. Gaugain*, 1 Phillips, 728; *Burgh v. Francis*, 3 Swanst. 536, note; *Finch v. Earl of Winchelsea*, 1 P. Wms. 277. Hence, in a case where equity will set aside a deed as against the grantee on the ground of duress, the same relief may be had as against the judgment creditor of the grantee: *Baker v. Morton*, 12 Wall. 150. And a very familiar example of the application of this rule is the case of a judgment rendered against a vendor which attaches only to right of the defendant to the balance of the purchase-money, notwithstanding he has the whole legal title: The principal case, and *infra*. But to entitle an equitable lien to precedence, it should be founded on some new consideration; for if the equities be equal, the holder of a judgment lien will be allowed his legal rights. Thus an agreement to make a mortgage to secure a pre-existing debt will not be enforced as an equitable lien against the lien of a judgment rendered subsequently to the agreement and prior to the execution of the mortgage: *Dwight v. Newell*, 3 N. Y. 185. And a further exception to the general rule exists where a judgment is rendered against a vendee for the purchase-money due the vendor; for a purchaser under such a judgment will take the title of both vendor and vendee: *Vierheller's Appeal*, 24 Pa. St. 106; S. C., 62 Am. Dec. 365; *Ziegler's Appeal*, 69 Pa. St. 471. And if the vendor takes a mortgage or judgment to secure the purchase price at the time of the conveyance to the vendee, he retains a lien which will not be displaced by any other encumbrance. Hence, if at the date of the conveyance a mechanic's lien existed against the vendee for certain buildings on the land, this lien will not take precedence over a judgment entered on the same day the conveyance was made to secure to the vendor the payment of the residue of the purchase-money: *Stoner v. Neff*, 50 Id. 260. And so a judgment on a note given for an improvement on a homestead was held to be a lien on the property enforceable even against a *bona fide* purchaser: *Hurd v. Hixon*, 27 Kan. 722.

Lien cannot be Impaired by Act of Debtor. — "The charge cast upon lands by a judgment lien can in no wise be limited or impaired by any act or omission of the debtor. The creditor has a charge on the interests of the defendant in the land just as they stood at the moment the lien attached": Freeman on Judgments, sec. 356; and therefore a subsequent sale or alienation or mortgage of the lands will not discharge or affect the lien: *Morris v. Mowatt*, 2 Paige, 586; S. C., 22 Am. Dec. 661; *Decker v. Gilbert*, 80 Ind. 107; *Brooke v. Sprague*, 99 Id. 169; *Rodgers v. McCluer's Adm'rs*, 4 Gratt. 81; S. C., 47 Am. Dec. 715; *Dengler v. Kiehner*, 13 Pa. St. 38; S. C., 53 Am. Dec. 441; *Agricultural Bank v. Pallen*, 8 Smedes & M. 357; S. C., 47 Am. Dec. 92, and note 93; nor can the defendant prejudice the rights of the plaintiff by making or accepting a lease subsequent to the judgment; and if he accept a lease from a third person, the purchaser at a sale under a judgment lien existing prior to the lease may dispute the title of the defendant's lessor: *Tinney v. Woolston*, 41 Ill. 215. But the lien will not attach to land conveyed with the consent of the judgment creditor: *Sharpe v. Davis*, 76 Ind. 17. And after a release a *bona fide* purchaser takes the land discharged of the lien, notwithstanding any mere oral agreements with the judgment creditor, that the land shall be sold for enough to pay off the judgment: *Snyder v. Crawford*, 98 Pa. St. 414.

Fixtures. — Whatever is part of the realty is bound by the lien of a judgment against the owner: *Coombs v. Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236. Therefore, if in a statute of the state the cars and other rolling stock of railroads are made fixtures, they are subject to judgment liens: *Railroad*

Company v. James, 6 Wall. 750. And so if one purchases land in good faith, without taking notice of a duly recorded judgment lien, the lien holds his improvements, though made in ignorance of it: *Taylor v. Morgan*, 86 Ind. 295.

Where Title Passes through Debtor as Mere Conduit, he having no interest in the land, a judgment against him will not attach as a lien upon the land: *Atkinson v. Hancock*, 67 Iowa, 452. Thus a purchaser who, contemporaneously with the conveyance of property to him, executes a trust deed of the same, has only a temporary seisin, not subject to judgment: *Cowardin v. Anderson*, 78 Va. 88. And so a conveyance, with covenant of title, made by a grantor who has a bond for a deed, before he obtains the legal title, vests the legal title in the grantee *eo instanti* when the grantor obtains it, and there is no space of time in which the lien of a judgment obtained against the grantor after the making of the conveyance can attach against the land: *Lamprey v. Pike*, 28 Fed. Rep. 30.

EQUITABLE INTERESTS. — At common law, the judgment lien does not attach to equitable interests: *Russell v. Houston*, 5 Ind. 180; *Jeffries v. Sherburn*, 21 Id. 112; *Harrington v. Sharp*, 1 G. Greene, 131; S. C., 48 Am. Dec. 365; *Nessler v. Neher*, 18 Neb. 649; *Jackson v. Chapin*, 5 Cow. 485; *Dixon v. Dixon*, 81 N. C. 323; *Bloomfield v. Humason*, 11 Or. 229; *Morsell v. First Nat. Bank*, 91 U. S. 357; *Brandies v. Cochrane*, 112 Id. 344; *Withnell v. Courtland Wagon Co.*, 25 Fed. Rep. 372; and see *Sandford v. McLean*, 3 Paige, 117; S. C., 23 Am. Dec. 773; *Unknown Heirs v. Kimball*, 4 Ind. 546; S. C., 58 Am. Dec. 638; even though the equity is one in possession: *Van Cleve v. Groves*, 4 N. J. Eq. 330. And therefore, in the absence of statutes declaring that a judgment shall be a lien upon equitable as well as legal estates, equitable estates are not at law subject to the lien: *Powell v. Knox*, 16 Ala. 364, and cases *supra*. In England, however, and in the majority of the several states, the common-law rule has been abolished, and the lien has been expressly extended to equitable estates: 1 & 2 Vict., c. 110, sec. 13; and "the general tendency of the American statutes creating and regulating judgment liens is to make such liens a charge upon whatever estate the judgment debtor may have, irrespective of the question whether his title is legal or equitable, perfect or inchoate": Freeman on Judgments, sec. 348; see *Maxwell v. Vaughn*, 96 Ind. 136. But to have this effect, the statute must be of clear import. Thus though a statute provided that a judgment should "be a lien on all real property of the judgment debtor not exempt from execution, owned by him in the county at the time of the docketing," it did not operate to make a judgment a lien upon the equitable title of the defendant: *Smith v. Ingles*, 2 Or. 43; see also *Bloomfield v. Humason*, 11 Id. 229; *Nessler v. Neher*, 18 Neb. 649.

But though equitable estates are not at law subject to the lien of a judgment and legal tribunals in the absence of statutes recognize no remedy for the enforcement of a judgment lien against them, yet in equity they are bound by the lien to the same extent as legal estates, and courts of equity will enforce this lien: *Unknown Heirs v. Kimball*, 4 Ind. 546; S. C., 58 Am. Dec. 638; *Lee v. Stone*, 5 Gill & J. 1; S. C., 23 Am. Dec. 589; *Haleys v. Williams*, 1 Leigh, 10; S. C., 19 Am. Dec. 743; *Michaux's Adm'r v. Brown*, 10 Gratt. 612. And in Pennsylvania, because of the want of a court of chancery, the courts were necessarily obliged to regard all judgments as operating immediately upon equitable as well as upon legal estates, and accordingly in that state a judgment attaches as a lien to equitable interests: *Anwerter v. Mathiot*, 9 Serg. & R. 397; *Russell's Appeal*, 15 Pa. St. 319; *Carkhuff v. Anderson*, 3 Binn. 4; *Brownfield v. Mackey*, 27 Pa. St. 320. But the interest

which is the subject of the lien must be an interest in the land itself: *Morrow v. Brenizer*, 2 Rawle, 185; *Thomas v. Simpson*, 3 Pa. St. 69; and therefore a devise to children, which gave their father the right to live on the land during his life, conferred no estate upon the father which was subject to a judgment lien: *Calhoun v. Jester*, 11 Id. 474. And likewise an easement consisting of a right of way, with such occupancy as is necessary to the exercise of the right, is not subject to judgment liens: *Western Pacific R. R. Co. v. Johnston*, 59 Id. 294; nor is a pre-emption right on public lands so subject: *Harrington v. Sharp*, 1 G. Greene, 131; S. C., 48 Am. Dec. 365; but the lien may attach to lands purchased from the government, though no patent therefor has yet issued: *Levy v. Thompson*, 4 How. 17; *Landes v. Brant*, 10 Id. 348; *Huntingdon v. Grantland*, 33 Miss. 453; *Cavender v. Smith*, 5 Iowa, 157; *Jackson v. Williams*, 10 Ohio, 69; *Rogers v. Brent*, 5 Gilm. 573.

Equity of Redemption. — An equity of redemption in real estate is subject to a judgment lien in states where equities are so subject: *Cook v. Dillon*, 9 Iowa, 407; S. C., 74 Am. Dec. 354; *Julian v. Beal*, 26 Ind. 220; *Wilhelm v. Humphries*, 97 Id. 520; *Taylor v. Cornelius*, 60 Pa. St. 187. And a judgment against the owner of the equity of redemption docketed after the decree of foreclosure, but before sale, is a lien on the surplus proceeds; but not if the docketing is subsequent to the sale: *Sweet v. Jacocks*, 6 Paige, 355; S. C., 31 Am. Dec. 252; *Denham v. Cornell*, 67 N. Y. 562. In the latter case, the remedy of the judgment creditor is by redeeming from the foreclosure sale: *Sullivan v. Leckie*, 60 Iowa, 326. In Illinois, however, the statutory right to redeem from forced sale is a personal right to which the lien of a judgment cannot attach: *Merry v. Bostwick*, 13 Ill. 398; *Watson v. Reissig*, 24 Id. 281; *Blair v. Chamblin*, 39 Id. 526; and the surplus after a sale by a trustee must be distributed among the general creditors, regardless of liens: *Pahlman v. Shumway*, 24 Id. 127.

Land Conveyed to Trustees. — A judgment lien does not attach to the debtor's interest in land conveyed by him upon active trusts and in which his estate is equitable merely, as is the case where he makes an assignment for the benefit of creditors; and no lien can arise except from a filing of a bill in equity, but by this means a judgment creditor may obtain a lien paramount to that of the judgment debtor in the surplus proceeds which otherwise would revert to the debtor: *Brandies v. Cochrane*, 112 U. S. 344; *Freeman's Savings and Trust Co. v. Earle*, 110 Id. 710; *McFerran v. Davis*, 70 Ga. 661; *Schroeder v. Gurney*, 10 Hun, 418; *Chautauque County Bank v. White*, 6 N. Y. 236; S. C., 57 Am. Dec. 442. But in states where equitable estates are subjected by statute to judgment liens, if judgment debtor has conveyed his realty to a trustee to secure an indebtedness, the judgment will take effect upon the debtor's equity of redemption, and if the land is sold by the trustee under the trust deed, the liens cease as against the land, and attach themselves to the money in the hands of the trustee after the secured debt is paid; and this fund may be proceeded against either by a bill in equity or by garnishing the trustee, but the trustee is not bound to search the records; and he is therefore relieved from all liability, if, without any knowledge of the existence of any judgment, he pays over the surplus without regard to the lien: *Cook v. Dillon*, 9 Iowa, 407; S. C., 74 Am. Dec. 354. The title of a grantee of a trustee in discharge of a trust is superior to that of a purchaser at a sale under a judgment rendered against the creator of the trust after its creation: *Clark v. Merriam*, 83 Ind. 58. But the estate of a purchaser at a trustee's sale, where the sale was made before the passage of an act subjecting equitable interests to sale on execution, but was not ratified until afterwards, is within that act, and is

therefore subject to the lien of a judgment against the purchaser: *Coombs v. Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236.

LANDS FRAUDULENTLY CONVEYED. — “Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits wherever fraud has taken them; to wrest them from the possession of his adversary wherever they may be found; and to prepare himself to show that the refuge to which they have been taken is still the refuge of fraud. In many instances the aid of equity is invoked. But generally this is unnecessary; for a transfer made to hinder, delay, or defraud creditors, while, as between the parties, it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity, — not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself against which the fraudulent transfer is no transfer at all”: Freeman on Executions, sec. 136, citing *Hall v. Sands*, 52 Me. 355; *Gormerly v. Chapman*, 51 Ga. 425; *Pratt v. Wheeler*, 6 Gray, 520; *Austin v. Bell*, 20 Johns. 442; S. C., 11 Am. Dec. 297; *Lowry v. Orr*, 1 Gilm. 70; *Gooch's Case*, 5 Coke, 60; *Jacoby's Appeal*, 67 Pa. St. 434; *Hoffman's Appeal*, 44 Id. 95; *Eastman v. Schettler*, 13 Wis. 324; *Pepper v. Carter*, 11 Mo. 540; *Barr v. Hatch*, 3 Ohio, 527; *Russell v. Dyer*, 33 N. H. 186; *Duvall v. Waters*, 1 Bland, 569; S. C., 18 Am. Dec. 350; *Middleton v. Sinclair*, 5 Cranch C. C. 509; *Laurence v. Lippencott*, 6 N. J. L. 473; *Croft v. Arthur*, 3 Desaus. Eq. 223; *Shears v. Rogers*, 3 Barn. & Adol. 363; *Staples v. Bradley*, 23 Conn. 107; *Fowler v. Trebein*, 16 Ohio St. 493; *Foley v. Bitter*, 34 Md. 646. “And what is true of fraudulent transfers is equally true of fraudulent mortgages, liens, judgments, executions, and all similar devices for hindering, delaying, or defrauding creditors. Property held under and by virtue of a fraudulent lien, execution, or transfer is subject to execution precisely as if such transfer had not been made, and such lien had not been given; and this whether it was wholly or partly fraudulent. For if, on account of fraud, it be void in part, it is at law void *in toto*”: Freeman on Executions, sec. 136, and cases there cited. “The right to issue execution, and to satisfy it by the sale of the defendant's real estate, ordinarily implies that the judgment is a lien upon such real property. There are manifest difficulties in extending this rule to all cases where real property has been transferred to hinder or defraud creditors. In the first place, the apparent title is in the fraudulent vendee, and nothing appears of record to impugn the fairness of the transfer, or to warn purchasers and incumbrancers that it remains subject to execution against the vendor. In the second place, the title in fact passes by the transfer not only as between the parties, but also as against creditors who do not assail the transfer by some proceeding at law or in equity, having for its object the subjection of the property to the payment of their claims against the vendor. Perhaps on the levy of the execution its lien may, as against persons not purchasers or encumbrancers in good faith and for value, relate back to the rendition or docketing of the judgment. But we think the better rule is, that one who has obtained judgment, and has not by levy or otherwise taken any further steps to obtain satisfaction out of the property fraudulently transferred, has no lien thereon, and in the event of the bankruptcy of the defendant, that he could not be awarded preference as a lien-holder: *In re Estes*, 12 Cent. L. J. 135; and that the judgment creditor first proceed-

ing in equity to set aside the conveyance, and to subject the land conveyed to the payment of his judgment, will thereby obtain the fruits of his diligence and overreach persons having prior judgments against the same grantor: *Lyon v. Robbins*, 46 Ill. 277": Freeman on Judgments, sec. 352; and see *Dunham v. Cox*, 6 N. J. Eq. 437; S. C., 64 Am. Dec. 460; *Chautauque Co. Bank v. Risley*, 19 N. Y. 369; S. C., 75 Am. Dec. 347; *George v. Williamson*, 26 Mo. 190; S. C., 72 Am. Dec. 203. And there are numerous decisions which maintain that a judgment lien does not attach to premises fraudulently conveyed by the judgment debtor: *Manhattan Co. v. Everton*, 6 Paige, 465; *McKee v. Gilchrist*, 3 Watts, 231; *Jacoby's Appeal*, 67 Pa. St. 435; *Mulford v. Peterson*, 35 N. J. L. 133. But many others maintain that it does: *Jackson v. Holbrook*, 32 N. W. Rep. 852 (Minn.); *Dunham v. Cox*, 10 N. J. Eq. 437; S. C., 64 Am. Dec. 460, and note 464; *Chautauque County Bank v. Risley*, 19 N. Y. 369; S. C., 75 Am. Dec. 347. Thus in the last case, it is held that a judgment creditor may rely on the lien of his judgment on real property, and on his means of enforcement at law instead of resorting to equity; and though the debtor has made a prior conveyance, yet the creditor may sell on execution, and the purchaser will have the right of impeaching the debtor's conveyance as fraudulent; and if the creditor's judgment was recovered before other creditors instituted proceedings in equity, nothing in the course or result of those proceedings can affect the rights of the purchaser under the judgment. See also *Eastman v. Schettler*, 13 Wis. 324; *Miner v. Warner*, 2 Grant Cas. 448. But a judgment lien on land held fraudulently by another person than the debtor and true owner ceases when the land is transferred to a bona fide purchaser: *Wood v. Wright*, 9 Biss. 365. And a judgment against a debtor docketed after an assignment to a receiver, pursuant to an order of court in a creditor's suit, of land alleged to have been fraudulently conveyed away by such debtor, is not a lien thereon: *Chautauque County Bank v. White*, 6 N. Y. 236; S. C., 57 Am. Dec. 442.

HOMESTEADS are generally regarded as not subject to judgment liens since they are exempt from execution, for the reason for the existence of the lien of a judgment is the liability of the property to be taken under execution and applied to the satisfaction of the debt. Real estate, therefore, so long as it retains the character of a homestead, is not subject to judgment liens, and may be conveyed and encumbered by its owner clear from liens of judgments previously docketed against him: *Ackley v. Chamberlain*, 16 Cal. 181; S. C., 76 Am. Dec. 516; *McDonald v. Badger*, 23 Cal. 400; *Sullivan v. Hendrickson*, 54 Id. 259; *Barrett v. Sims*, 59 Id. 619; *Houghton v. Lee*, 50 Id. 103; *Monroe v. May*, 9 Kan. 475; *Morris v. Ward*, 5 Id. 247; *Gapen v. Stephenson*, 17 Id. 617; *Lamb v. Shays*, 14 Iowa, 567; *Wiggins v. Chance*, 54 Ill. 175; *Black v. Epperson*, 40 Tex. 162; Freeman on Executions, sec. 218. But if the abandonment of the homestead claim so far precedes the conveyance of the premises that they cannot be regarded as simultaneous acts, then as an opportunity is given for the attachment of the liens, the purchaser will take the property subject to the liens of all the judgments docketed against the grantor at the time of the conveyance: *Marriner v. Smith*, 27 Cal. 649; *Green v. Marks*, 25 Ill. 222; *Ackley v. Chamberlain*, 16 Cal. 181; S. C., 76 Am. Dec. 516. But as all prior judgments attach at the moment of abandonment, they will have no precedence over one another, and the judgment creditor who first proceeds to the enforcement of his judgment will gain thereby a priority over the other judgment creditors: *Bliss v. Clark*, 39 Ill. 596; *McDonald v. Crandall*, 43 Id. 231. Where, however, the debtor's land is worth more than the value of a homestead, the lien attaches to the excess in the hands of

the debtor's grantee: *Moriarty v. Gall*, 112 Ill. 373. And after a judgment lien has attached, it cannot be divested by the subsequent occupation of the premises as a homestead, but the homestead right will be postponed to the lien of the judgment: *Gage v. Neblett*, 57 Tex. 374; *Elston v. Robinson*, 21 Iowa, 531. But if a homestead be foreclosed, and sold under a decree of court, and a judgment be docketed for a deficiency remaining after the sale, it will constitute no lien on the homestead: *Martens v. Gilson*, 13 Nev. 489; *Hershey v. Dennis*, 53 Cal. 77. But a judgment on a note given for an improvement on a homestead was held to be a lien on the property, enforceable even against a *bona fide* purchaser: *Hurd v. Hixon*, 27 Kan. 722.

In Wisconsin and Minnesota, statutes providing in general terms that judgments should be liens on all the defendant's real estate were construed by the early decisions as extending such liens to homesteads; and although as long as the premises retain the homestead character they cannot be sold under execution, yet the moment this is removed they become subject to sale, and consequently, upon the alienation of the homestead by the judgment debtor, the property will become liable to sale in the hands of the alienee for the satisfaction of judgments subsisting against the alienor at the time of the conveyance: *Hoyt v. Howe*, 3 Wis. 752; S. C., 62 Am. Dec. 705, and note 709; *Folsom v. Carli*, 5 Minn. 335; *Tillotson v. Millard*, 7 Id. 513; and see *Smith v. Brackett*, 36 Barb. 571; and this rule prevails in some other states: See *Eaton v. Ryan*, 5 Neb. 47; *State Bank v. Carson*, 4 Id. 498; *Moore v. Granger*, 30 Ark. 574; *Jackson v. Allen*, 30 Id. 110; *Whitworth v. Lyons*, 39 Miss. 467. The Wisconsin statute of 1858 was undoubtedly passed to change this law: See note to *Hoyt v. Howe*, 62 Am. Dec. 709.

REVERSIONS AND REMAINDERS are legal estates, and are subject to sale under execution, or to be taken under an *elegit*, and they are therefore subject to judgment liens: Freeman on Executions, sec. 178; *Williams v. Amory*, 14 Mass. 20; *Woodgate v. Fleet*, 44 N. Y. 1; *Brown v. Gale*, 5 N. H. 416; *Humphreys v. Humphreys*, 1 Yeates, 427; *Den v. Hillman*, 7 N. J. L. 180; *Burton v. Smith*, 13 Pet. 462; *Bishop of Bristol's Case*, 2 Leon. 113; Watson on Sheriffs, 208. Such an estate, "though it does not entitle the reversioner or remainderman to the immediate possession of lands, is, nevertheless, for the purpose of sale and conveyance, whether voluntary or involuntary, treated as an estate in possession": Freeman on Judgments, sec. 354.

RENTS. — The lien of a judgment is ordinarily confined to real estate, and does not extend to rents and profits: *Fifield v. Gorton*, 15 Ill. App. 458. Thus the lien of a judgment on the debtor's right to redeem on paying a certain sum does not entitle the judgment plaintiff to demand an accounting for rents and profits: *Wilhelm v. Humphries*, 97 Ind. 520. But if upon filing a bill to have land sold under the plaintiff's judgment a receiver of the rents and profits be appointed, all the moneys which come into his hands for rents are in equity subject to the lien of the judgment; and if the lands be sold for a sum insufficient to satisfy the plaintiff's lien, these funds held by the receiver are immediately applicable towards paying the balance due: *United States v. Butler*, 2 Blatchf. 201. A debtor who has executed a deed reserving a rent charge retains an interest in the realty which is subject to sale under execution: *Hurst v. Lithgow*, 2 Yeates, 24; S. C., 1 Am. Dec. 326.

LEASEHOLD. — An estate for years in land is at common law a chattel interest, and is therefore not bound by the lien of the judgment, and can be subjected thereto only by levy and sale under execution like other personal property: *Merry v. Hallet*, 2 Cow. 497; *Vredenberg v. Morris*, 1 Johns. Cas.

223. In some states, however, it has been by statute subjected to judgment liens: *First National Bank v. Bennett*, 40 Iowa, 537. And a judgment will attach as a lien upon the interest of the debtor in land hired by him under a lease in which he agrees to purchase the land within three years: *Gorham v. Harson*, 10 N. E. Rep. 1 (Ill.).

"COPYHOLD ESTATES AND ALL OTHER TENANCIES AT WILL or by sufferance are not subject to execution. The reason of the rule is apparent. An occupant by the permission and at the will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence, he has no interest in the title nor in the possession susceptible of transfer by execution": Freeman on Executions, sec. 177, citing *Wildy v. Bonney*, 26 Miss. 35; *Wagner v. Speak*, 3 Ohio, 292; *Colvin v. Baker*, 2 Barb. 206; *Bigelow v. Finch*, 11 Id. 498.

VENDORS AND VENDEES. — We have seen that the lien of a judgment attaches to the actual interest and not to the apparent interest of the judgment debtor. "It follows from this rule that upon the recovery and docketing of a judgment against a vendor or a vendee, the interest which may pass by any sale made to render such lien available will be governed, if the lien be against the vendee, by the proportion of the purchase-money paid by him; and if it be against the vendor, by the portion of the purchase-money remaining unpaid. In other words, the purchaser, under a lien against a vendee, will be entitled to a conveyance from the vendor, upon precisely the same terms which would have been open to the vendee under his contract; and a purchaser under a lien against a vendor will be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been compelled to convey. In all cases a purchaser at a sale under a judgment succeeds to the rights and responsibilities of the judgment debtor, and to no other": Freeman on Judgments, sec. 363; *Catlin v. Robinson*, 2 Watts, 373; *Anwerter v. Mathoit*, 9 Serg. & R. 402; *McMullen v. Wenner*, 16 Id. 20; S. C., 16 Am. Dec. 453; *Purviance v. Lemmon*, 16 Serg. & R. 294; *Russell's Appeal*, 15 Pa. St. 319; *Stewart v. Coder*, 11 Id. 94; *Garrard v. Lantz*, 12 Id. 193; *Mellon's Appeal*, 32 Id. 128; *Stannis v. Nicholson*, 2 Or. 332; *Cromwell v. Craft*, 47 Miss. 44; *Railroad Company v. Wilson*, 7 Rep. 243; *Courtney v. Parker*, 16 Neb. 311; S. C., 33 N. W. Rep. 262; *Baker v. Thompson*, 34 N. W. Rep. 51 (Minn.). And if the vendee has paid the whole of the purchase price, a lien against the vendor can attach to nothing but the mere legal title; and a purchaser with notice of the payment made will take nothing but the right to hold the title until the vendee asks for it, and he will be compelled to transfer it to the vendee upon demand: *Lounsbury v. Purdy*, 11 Barb. 490; *Thomas v. Kennedy*, 24 Iowa, 397; *McMullen v. Wenner*, 16 Serg. & R. 18; S. C., 16 Am. Dec. 543; *Manly v. Hunt*, 1 Ohio, 257. And on the other hand, where a valid contract of sale is made, but no part of the purchase-money is paid, the vendee has an equitable interest, which a court of equity will protect against the lien of a judgment docketed after the making of the contract: *Lane v. Ludlow*, 2 Paine, 591; *Hampson v. Edelen*, 2 Har. & J. 64; S. C., 3 Am. Dec. 530; *Keirsted v. Avery*, 4 Paige, 9. Where the vendor held the right to obtain title on certain terms from the state, the land was bound by the lien of a judgment against him, though not the vendor but the vendee complied with the terms and obtained the patent: *Carkhuff v. Anderson*, 3 Binn. 4. But where two parties made a parol agreement to purchase land jointly, but the purchase was made by one alone on his own credit, who gave a bond for the purchase-money, occupied the premises for many

years, and sold and conveyed a part of it, but afterwards proving unable to advance his share of the purchase-money, it was advanced by the other, who took a conveyance of the whole in fee, it was held that judgments rendered against the party who made the purchase, prior in date to the conveyance, were liens upon his interest in the land; but as to those rendered subsequently to that period, the party to whom the conveyance was made was entitled to relief by perpetual injunction: *Hollida v. Shoop*, 4 Md. 465; S. C., 59 Am. Dec. 88. In some states, however, a judgment against one having the right to compel a conveyance of land upon payment of the purchase-money is not a lien on the land: *Evans v. Feeny*, 81 Ind. 532.

Vendor's Lien. — A mortgage, trust deed, or other instrument given to secure the purchase-money of land takes precedence over a prior judgment lien against the vendee: *Parsons v. Hoyt*, 24 Iowa, 154; *Hughson v. Davis*, 4 Grant Ch. 588; *Ruttan v. Lemisconte*, 16 U. C. Q. B. 495. But where a mortgage is dated several days after the sale of the land, and does not show upon its face that it was given to secure the payment of the purchase-money, a purchaser under the judgment, in the absence of actual notice, is not affected by the higher character of the mortgage lien due to the nature of the debt secured; and if the judgment lien attached prior to the date of the mortgage, he will take the title free from the lien of the mortgage: *Curtis v. Root*, 28 Ill. 367. And a judgment creditor who advances his money upon the faith of unencumbered title upon the record, without actual notice, is entitled to the lien of his judgment in preference to the unrecorded lien of the vendor for the purchase-money for "such judgment creditor is to be regarded as a quasi purchaser for a valuable consideration without notice": *Hullett v. Whipple*, 58 Barb. 224; Freeman on Judgments, sec. 360; see *Moore v. Byers*, 65 N. C. 240; *Woodward v. Dean*, 46 Iowa, 499. But if, after the execution of the contract of sale, a judgment is docketed against the vendee, and the vendor conveys to the vendee, but reserves a lien for the unpaid balance of the purchase-money, the lien of the judgment will be thereby extended to the whole estate, but it will be subject to the vendor's lien: *Episcopal Academy v. Frieze*, 2 Watts, 16. If a judgment is entered against a vendee, its lien will not be displaced by a decree in favor of the vendor setting aside the sale, unless the judgment creditor was a party to the decree: *Stevens v. Sellars*, 59 Ga. 540.

Payments by Vendee after Judgment against Vendor. — The lien of a judgment against a vendor extends to all sums remaining unpaid by the vendee upon the contract; but the judgment creditor must take proper care to notify a vendee in possession of his judgment, and must take the proper steps to subject the amount due from the vendee in possession to the payment of his judgment. For it is well settled that a vendee in possession is not bound to ascertain, before making any payments to his vendor, that no judgments have been docketed against the latter. And this is so because his possession is notice to all the world of his interest in the land, and therefore charges the judgment creditor with notice and puts him in a position to effectuate his lien; whereas, such being the case, it has been regarded as obviously unjust to compel a vendee in possession, who has no actual knowledge of the judgment lien, to pay to the vendor the sums falling due at his peril and in any event, even after the exercise of the utmost vigilance, to take the risk of a judgment being docketed against his vendor between the time when he searches the record and the time when he makes the payment. And it has therefore seemed proper to relieve a vendee in possession from this obligation, and in the absence of actual notice, to hold that a payment to the ven-

dor, even after judgment docketed, is a discharge *pro tanto* of such a vendee. "This construction of the law seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule": Freeman on Judgments, sec. 364; the principal case; *Mayor v. Hinman*, 13 N. Y. 180, reversing S. C., 17 Barb. 137; *Parks v. Jackson*, 11 Wend. 442; S. C., 25 Am. Dec. 656; *Hampson v. Edelen*, 2 Har. & J. 64; S. C., 3 Am. Dec. 530. But a vendee who, with knowledge of the pendency of a suit against his vendor, pays the balance of the purchase-money, does so at his peril, where the lien of the judgment relates back to the first day of the term, and will take the land subject to the judgment lien to the extent of the purchase-money remaining unpaid at the first day of the term: *Lefferson v. Dallas*, 20 Ohio St. 68.

The Georgia code, section 3583, providing that "when any person has *bona fide*, and for a valuable consideration, purchased" land, and has remained in possession four years, the land shall be discharged from the lien of any judgment against his vendor, does not protect one purchasing with notice of such lien, and actual notice to the agent is actual notice to the principal: *Prater v. Cox*, 64 Ga. 706.

LANDS INTENDED TO BE CONVEYED. — If A, intending to convey or encumber Black Acre, through mistake conveys or encumbers White Acre, and he afterwards corrects his error, or his deed is reformed by proceedings in equity, his grantee will acquire title superior in equity to the lien of any judgment rendered after the intended conveyance of Black Acre: *Gouverneur v. Titus*, 6 Paige, 347; *Swarts v. Stees*, 2 Kan. 236.

JUDGMENT AGAINST PART OWNER is a lien upon his interest in the land, but the lien is subject to all existing rights and equities as in the case of several ownership: *Buchan v. Sumner*, 2 Barb. Ch. 165; S. C., 47 Am. Dec. 305. Property may stand in the name of copartners as tenants in common; but equity will regard it as the property of the partnership, and the partners or creditors of the firm may insist that it be treated as partnership assets. The judgment lien of a separate creditor will in such case, therefore, attach only to the legal title of the debtor partner, and he will have no right to withdraw any portion of the realty from the firm assets: *Meily v. Wood*, 71 Pa. St. 488; *Hoskins v. Johnson*, 24 Ga. 625. Such a lien is also subordinate to the prior equitable lien of a copartner who has paid all the debts of the firm: *Buchan v. Sumner*, 2 Barb. Ch. 165; S. C., 47 Am. Dec. 305. On the other hand, the lien of judgments against a firm does not attach to land conveyed by one of the partners in fraud of his creditors, and the proceeds thereof upon a sale by the assignee in bankruptcy, after obtaining a decree setting aside the conveyance, constitute the separate estate of the grantor, and must be first applied to the payment of his separate creditors: *In re Estes*, 6 Saw. 459.

If a judgment lien attach to the lands of a co-tenant, it will attach to his share of the land as afterwards set off to him by partition, whether voluntary or by suit: *Polhemus v. Empson*, 27 N. J. Eq. 190; *Barrington v. Clarke*, 2 Penr. & W. 124; S. C., 21 Am. Dec. 432; *Longwell v. Bentley*, 23 Pa. St. 103; *Williard v. Williard*, 56 Id. 127; *Argyle v. Dwinel*, 29 Me. 45; and if the land is sold it will attach to his share of the proceeds: *Garvin v. Garvin*, 1 S. C. 55.

JUDGMENT LIEN AFTER DEATH OF DEFENDANT. — This subject is treated in the note to *Kimball v. Jenkins*, 89 Am. Dec. 242, 243.

TRUSTEES AND EXECUTORS AND ADMINISTRATORS. — Trustees have no authority to transgress or act at variance with the powers conferred upon them by their trust. And if without authority they seek to bind the land held

in trust by a confession of judgment, the judgment can attach as a lien upon nothing but their personal interests, and cannot operate to transfer the estate of the *cestuis que trustent*: *Huntt v. Townshend*, 31 Md. 336. The actual interest of the defendant is all that can be affected by a judgment lien, and therefore if a parol trust in land has been executed but the naked legal title notwithstanding remains in the trustee, his creditor cannot by a judgment acquire a lien on the land: *Hays v. Reger*, 102 Ind. 524. And so where lands were bought and paid for by a corporation, but the deed by mistake was drawn in the individual name of its treasurer, as grantee, the corporation, however, openly using and occupying the premises, personal judgments against the treasurer were not liens on the premises, and the corporation was entitled to relief against the purchaser at the sheriff's sale under the judgments, notice of the corporation's rights having been given at the sale; and the corporation was not estopped by bidding at the sale: *Holmdel etc. Co. v. Conover*, 34 N. J. Eq. 364. But a trustee who, without the knowledge of his *cestui que trust*, purchases real estate, taking the title in his own name, and pays part of the consideration with trust funds in his hands, and gives his own note and mortgage for the balance, has an interest in the real estate upon which a judgment against him will become a lien: *Martin v. Baldwin*, 30 Minn. 537.

EXECUTORS AND ADMINISTRATORS are not invested with the title to the land of the decedent, and therefore judgments against them, even in their official capacities, are not liens upon the land of the estate: *Hamilton v. Beardmore*, 7 Grant Ch. 286; *Laidley v. Kline*, 8 W. Va. 218; *Woodyard v. Polsley*, 14 Id. 211; *Custer v. Custer*, 17 Id. 113. And a judgment recovered against executors as such is not a lien on land conveyed to them as executors: *Cook v. Ryan*, 29 Hun, 249. Judgments of this character are to be satisfied out of the lands of the estate in no manner otherwise than in the case of other demands, namely, by an application to the probate court for an order directing a sale of the real estate for the payment of debts; and upon such an application the judgment is not entitled to be treated either as a lien or a conclusive evidence of debt: *Stone v. Wood*, 16 Ill. 177; *Treadwell v. Herndon*, 41 Miss. 38.

After the death of the defendant no judgment could be entered up at common law; but by statute Car. II., c. 8, it was provided that the death of either party between verdict and judgment should not thereafter be alleged for error against any judgment entered within two terms after verdict. This statute was construed as giving full force to the judgment authorized by its provisions; and such judgments were held to be liens on the lands of the debtor in the hands of his heir: *Saunders v. McGowan*, 12 Mees. & W. 221; S. C., 1 Dowl. & L. 405. In California, judgment may be entered up after verdict or the decision of any issue of fact though one of the parties has died; but the judgment is not a lien, and is simply payable in the course of administration: Cal. Code Civ. Proc., sec. 669; *Estate of Page*, 50 Cal. 40.

PROPERTY OF WIFE. — The right of a wife to her property after a violation by the husband of his marital obligations is superior to the lien of any judgment rendered against him after such violation, and secures to her the immediate use of her lands free from such lien, upon her substantiating her right by procuring a decree of separation for the misconduct of her husband. But her rights cannot be enforced against a *bona fide* purchaser without notice, under a sale made before the filing of the bill for separation: *Van Duzer v. Van Duzer*, 6 Paige, 366; *Sackett v. Giles*, 3 Barb. Ch. 204.

DOWER. — A judgment rendered against a man prior to his marriage creates a lien upon his land not subject to be divested by his subsequent marriage, and paramount to the wife's right of dower created thereby: *Sandford v. McLean*, 3 Paige, 117; S. C., 23 Am. Dec. 773; *Eiceman v. Finch*, 79 Ind. 511; *Queen Anne's County v. Pratt*, 10 Md. 5; *Davidson v. Frew*, 3 Dev. 3; S. C., 22 Am. Dec. 708; *Hodges v. McCabe*, 3 Hawks, 78; *Lane v. McGover*, 3 Har. & McH. 394; *Robbins v. Robbins*, 8 Blackf. 174; *Brown v. Williams*, 31 Me. 403; *Bisland v. Hewett*, 11 Smedes & M. 164. But if the lien attaches subsequent to the marriage, it will be subordinate to the wife's right of dower: *Coombs v. Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236; *Pifer v. Ward*, 8 Blackf. 252; *Gould v. Luckett*, 47 Miss. 116; *Gove v. Cather*, 23 Ill. 634; *Shaeffer v. Weed*, 3 Gilm. 511; and even if the judgment be entered on the day of the marriage, it cannot defeat the wife's dower right: *Ingram v. Morris*, 4 Harr. (Del.) 111. As a judgment lien does not affect the husband's seisin, it cannot, until by a sale it has transferred the title, destroy the wife's right to dower; and she may have her dower assigned to her, unless a sale has been made, but she holds the assignment subject to the contingency of losing it by a subsequent sale had during the life of the lien: *Scribner on Dower*, 573.

AFTER-ACQUIRED LANDS. — Judgments are generally regarded as binding by lien realty acquired by the judgment debtor after the docketing of the judgments: *Note to Roads v. Symmes*, 13 Am. Dec. 626, 627, and cases cited; *Coll v. Du Bois*, 7 Neb. 391, 394, overruling the principal case; *Leonard v. White Cloud Ferry Co.*, 11 Id. 340; *Barron v. Thompson*, 54 Tex. 235; *McClung v. Beirne*, 10 Leigh, 394; S. C., 34 Am. Dec. 739. Though in some states a contrary rule prevails: *Roads v. Symmes*, 1 Ohio, 281; S. C., 13 Am. Dec. 621; *Noblet v. St. John*, 29 Minn. 180; *Harrington v. Sharp*, 1 G. Greene, 131; S. C., 48 Am. Dec. 365; *Waters's Appeal*, 35 Pa. St. 523. Where the rule prevails, however, a personal judgment in an action to foreclose a mortgage will attach to after-acquired land: *Lisle v. Cheney*, 13 Pac. Rep. 816 (Kan.). And if the judgment debtor redeems land sold on execution in only part satisfaction of the judgment, the balance of the judgment at once attaches as a lien upon the property in his hands: *Peckenbaugh v. Cook*, 61 Iowa, 477. But a judgment docketed for a deficiency after the sale of mortgaged premises under a judgment of foreclosure is not a lien upon the premises sold, if they are purchased by any other person than the mortgage debtor: *Black v. Gerichten*, 58 Cal. 56.

But the lien cannot attach before the land comes into the hands of the debtor, and can arise only upon the happening of that contingency. Therefore the lien is regarded as attaching *eo instanti*, the title passes to the debtor, and it does not relate back to the rendition of the judgment. Therefore there is no priority between the liens of judgments rendered before the acquisition of the property by the debtor, for as all attach at the same time, they must stand on the same footing, though the judgments may have been recovered at different times: *Relfe v. McComb*, 2 Head, 558; *Greenway v. Cannon*, 3 Humph. 177; S. C., 39 Am. Dec. 161; *Davis v. Benton*, 2 Sneed, 666; *Chapron v. Cassada*, 3 Humph. 661; *Cayce v. Stovall*, 50 Miss. 396; *Moody v. Harper*, 25 Id. 484; *Barth v. Makeever*, 4 Biss. 206; *Michaels v. Boyd*, 1 Ind. 259. And "this construction seems to be of undisputed correctness, and to be adopted wherever the question has arisen": *Freeman on Judgments*, sec. 368. See "Homesteads," *supra*.

THE PRINCIPAL CASE IS CITED to the point that the judgment lien attaches only to the interest of the debtor in the land, and can attach to no greater interest than that owned by the debtor: *Berkley v. Lamb*, 8 Neb. 399. In *Coll*

v. *Du Bois*, 7 Id. 391, 394, the principal case is overruled upon one point, and the true rule is stated to be that the lien of a judgment attaches to all lands and tenements of the debtor in the county where the judgment is rendered, whether held by him at the time of its rendition or subsequently acquired. See also *Leonard v. White Cloud Ferry Co.*, 11 Id. 340; *Barron v. Thompson*, 54 Tex. 238.

MCAUSLAND v. PUNDT.

[1 NEBRASKA, 211.]

GENERAL RULE THAT DERIVATIVE TITLE CANNOT BE BETTER than that from which it is derived is subject to many necessary exceptions.

GRANTEE OF JUDGMENT CREDITOR WHO PURCHASES DEBTOR'S LAND AT SALE under his judgment acquires a good title, notwithstanding the judgment is afterwards reversed.

JUDGMENT CREDITOR WHO PURCHASES DEBTOR'S LAND AT SALE UNDER HIS JUDGMENT acquires a title no more affected by a reversal of the judgment than if he had been a stranger. *Per Crounse, J.*

RULE THAT TENANT OR VENDEE IN POSSESSION CANNOT DENY TITLE under which he entered is confined to the title of the landlord or vendor at the time possession is given.

TENANT OR VENDEE IN POSSESSION IS NOT ESTOPPED FROM SHOWING that title of lessor or vendor has passed from him by his own conveyance, or by sale under judgment against him; and may acquire good title from the grantee or purchaser under the judgment.

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND WILL NOT BE DECREED, where the vendee has been guilty of gross negligence; nor will a court of equity allow parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and, according to the event, either abandon it, or, considering the lapse of time as nothing, claim a specific performance.

NEGLECT OF VENDEE TO COMPLY WITH HIS AGREEMENTS IS NOT EXCUSED by the circumstance that the title to the land was in litigation, if the litigation was pending when the contract was made, and an adverse determination was provided against by the vendee by taking the guaranty of a third person.

BILL in equity to enforce the specific performance of a contract for the sale of land. The opinion states the case.

J. M. Woolworth, for the appellant.

E. Wakely, contra.

By Court, CROUNSE, J. This was an appeal from a decree rendered by myself, sitting in the district court for Douglas County, dismissing complainant's bill. This court being unanimous in sustaining the decision there made, I will briefly state some of the reasons inducing it.

The suit was brought in the name of Alexander McAus-

land, and revived in the name of his children, the present complainants, to enforce the specific performance of a written contract entered into between one Hughes and himself, for the sale of a certain building lot in the city of Omaha.

The facts involved may be best understood when stated in the order of their occurrence chronologically.

February 14, 1859, William M. Jones held the legal title to a certain lot in Omaha, which may be designated as the Farnham Street lot. On that day a suit was instituted in the district court for Douglas County, by Charles W. Green, and others, creditors of one Franklin W. Brown, against said Brown and Jones, alleging that Brown was the real owner of said lot, and asking a decree declaring that Jones held the same in trust for the benefit of the creditors of Brown, and that it be sold to satisfy their judgments. May 28, 1859, Jones, in writing, agreed to sell to John Hughes, aforesaid, the Farnham Street lot, Hughes to pay him two thousand dollars at any time Jones should execute and deliver to him a good and sufficient warranty deed of said premises, and until such time Hughes to pay Jones three hundred dollars annual rent for the use of the same. May 30, 1859, Pun dt and Koenig, being seised in common of the lot in question, and which may be distinguished as the "Douglas Street lot," entered into a written agreement with Hughes, by which the latter agreed to convey by warranty deed the Farnham Street lot to them, when he should obtain title to the same, when Pun dt and Koenig were, besides other considerations, to convey to Hughes the Douglas Street lot.

July 9, 1859, Hughes and Alexander McAusland enter into the agreement in writing, the specific performance of which is sought in this suit, by which Hughes sells to McAusland the Douglas Street lot, and is to execute a good and sufficient deed for the same when McAusland shall have paid three several promissory notes given to Hughes, each for \$116.67, payable in one, two, and three years respectively, with ten per cent interest annually. McAusland is to pay all taxes assessed on the premises. Upon McAusland's failure to perform any of his agreements, Hughes may declare all the remaining payments due, and may foreclose the agreement as a mortgage. Hughes agrees that if he shall fail to make the deed as therein named, McAusland shall collect the sum of one thousand dollars damages. The agreements of Hughes are guaranteed by Sahler & Co. Under this agreement, Mc-

Ausland went into possession, put on the lot a building worth from one thousand to fifteen hundred dollars; has occupied the premises ever since, paid the taxes thereon but rarely, and has paid nothing upon the notes. January 15, 1861, the district court, in the suit of Green and other creditors against Jones, decreed that Jones held the Farnham Street lot in trust, and that it be sold to pay Brown's creditors. From this decree an appeal was taken to the supreme court of the territory, but no bond was given to stay the execution of the decree. May 13, 1861, the Farnham Street lot was sold by the sheriff under the decree last mentioned, Green, one of the plaintiffs, becoming the purchaser. The sale was confirmed, and Green received a deed for the premises. June 11, 1861, the supreme court of the territory affirmed the decree of the district court. From the judgment of that court an appeal was taken to the supreme court of the United States. March 11, 1861, Green sold and conveyed the Farnham Street lot so bought by him at sheriff's sale to Pundt and Koenig aforesaid. July 10, 1862, Hughes, then residing in England, "sold and conveyed and quitclaimed" to John I. Redick and Clinton Briggs certain real and personal property in Nebraska, describing among others the Farnham Street lot, but not the Douglas Street lot, "and all other real or personal property which have any legal or equitable interest in"; also "sold and assigned to them all the moneys, rights, and credits of every description belonging to him from any one, etc." In December, 1865, the supreme court of the United States reversed the decree of the district and supreme courts of Nebraska, in the case of Green and others against Jones and Brown. March 24, 1866, Jones conveyed to Redick and Briggs all of his interest in the Farnham Street lot. Shortly thereafter Redick and Briggs released to Pundt and Koenig their interest in the Farnham Street lot, and received in return a deed for themselves of the Douglas Street lot.

The complainant's claim to succeed proceeds upon the assumption that Redick and Briggs, as the assignees, and under the conveyance from Hughes, first executed the contract between Jones and Hughes, thereby possessing themselves of the Farnham Street lot, then exchanged that with Pundt and Koenig for the Douglas Street lot, in pursuance of the contract between Hughes and Pundt and Koenig; and that now having the lot in question as the assignees of Hughes, and having notice of Hughes's contract with McAusland, they

are as much bound as he would have been to convey to McAusland or his representatives. This theory gives no importance to the circumstance that long prior to the conveyance from Jones to Redick and Briggs of the Farnham Street lot, the same had been sold to Green under judicial sale, who had sold to Pundt and Koenig. This, to my mind, is a very important circumstance; for if Pundt and Koenig had already possessed themselves of a good title to the Farnham Street lot from another source than from Hughes, the consideration for which they were to give Hughes the Douglas Street lot was gone, and neither Hughes nor his assignees could claim the Douglas Street lot because of the contract between Hughes and Pundt and Koenig. This circumstance appellant's counsel wipes out in a very summary manner with a syllogism: "No man can transfer a greater right or interest than he himself possesses." Green's title, Green being a party to the suit in which the decree was given, upon the reversal of the decree by the United States supreme court, must have reverted to Jones. Green conveyed to Pundt and Koenig; therefore Pundt and Koenig's title passed back to Jones. But the maxim here invoked, like many others, is subject to its qualifications and exceptions. The books are full of illustrations showing that the rights which fall under the protection of commercial law, the respect paid to judicial proceedings, the regard given to claims of innocent parties, and the like, are considerations before which the rule must give way. By sale in market overt, one wrongfully in possession of a chattel may convey a good title to a *bona fide* purchaser; so the holder of a negotiable note, who could not himself recover upon it as against the rightful owner, may frequently by transferring it for value vest a perfectly valid and unimpeachable title in the assignee. So under the law of stoppage *in transitu* the title of the consignee may be such that the consignor may revest himself of the goods; but possessed of a bill of lading, the consignee may transfer a title to an innocent third party, which is beyond the power of the consignor to disturb. "The law," says Chancellor Kent in *Denniston v. Bacon*, 10 Johns. 197, "has always had a regard for derivative titles when fairly procured; and though it may be true as an abstract principle that a derivative title cannot be better than that from which it is derived, yet there are many necessary exceptions to the operation of this principle." In that case, a sale under the power of attorney contained in a mortgage, being equivalent to a fore-

closure under a decree of a court of equity, was held to give good title notwithstanding the contract upon which the mortgage was given as security was usurious, and the statute declared the contract and the security given under it void.

Let it be conceded that had Green retained the Farnham Street property under the reversal by the United States supreme court of the decree of the courts of Nebraska, Jones would have been in as of his former estate, is it because Green was seised of what counsel chooses to term a "defeasible title"? or because of considerations of convenience, the relation of particular persons to the property at the time, and like matters not growing out of the character or quantity of the estate held by Green? For it must be admitted that if the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer: 4 Kent's Com. 10. The district court of Nebraska, with authority unquestioned, had decreed that Brown was the owner of the lot, and ordered that it be sold. No *supersedeas* bond being filed to stay the execution of this decree, the sheriff was compelled to sell it: R. S., Code, tit. 24, sec. 775. The title he conveyed was the same quantity that Brown might have conveyed. That by the district court was declared to be the fee-simple in a decree which was in full force. It is not disputed but that had a third party purchased at the sheriff's sale, instead of a plaintiff in the suit, his title would have been absolute and unaffected by this reversal: *Wood v. Jackson*, 8 Wend. 9 [22 Am. Dec. 603]; *Woodcock v. Bennett*, 1 Cow. 711 [13 Am. Dec. 568]; *Taylor v. Boyd*, 3 Ohio, 337 [17 Am. Dec. 603]. This is so by statute, which makes no distinction in favor of third parties: Code, 508. The deeds given to the party purchaser, and to third parties, are similar. No defeasance is expressed, and a deed cannot be defeated by one not in writing. Therefore, with the same grantor, a given estate, conveyances identical, and under a law discriminating in favor of neither, it necessarily follows that the estate passed in either case must be the same. If there be any good reason why the property reverts from the hands of the purchaser plaintiff, it must be for some other than that he takes what can legally be denominated a defeasible title. Judge Lane, in *Hubbel v. Broadwell*, 8 Ohio, 120 (one of three cases cited in support of the position that had Green retained the property until the reversal of the decree it must have reverted to Jones), says: "It is the settled policy of the court to protect judicial sales. Where lands

have passed by sale under execution to a stranger to a judgment, the statute compels the owner of the land on reversal to pursue the fruits of the sale in the hands of his antagonist. But when a party to a judgment purchases and continues to hold, this rule does not apply with the same force. The purchaser is a party to the errors, and it seems most consonant with justice to restore the land itself to its original owner, where it remains between the original parties and within reach of the court, no new rights intervening." The statute here referred to is that of which I believe ours is a transcript. What warrant there may be for a court to override the express language of it, when it declares that "such reversal shall not defeat or affect the title of the purchaser" to the prejudice of a party to a judgment, because in his opinion "it seems most consonant with justice," I shall not here stop to inquire. But from the peculiarly guarded manner of expressing himself, it is very certain that the rule here announced was not designed to extend to a case like the present one, where the property has passed from the hands of the judgment creditor to those of third parties. The language used is, "where a party to a judgment purchases and continues to hold," and "where it remains between the original parties and within reach of the court, no new rights intervening."

The next case, *McBlain v. McBlain*, 15 Ohio St. 337, is not one of reversal of a judgment, but of an order confirming a sale; a distinction to which some importance is given in the opinion. Even in this case, caution is shown not to extend the effect of a reversal to third parties. Welch, J., who delivered the opinion, says: "It is enough here, however, to say that the purchaser was not only a party to the sale, but also a party to the suit, and that no legal rights had been acquired by third parties before the reversal." In the remaining case, *Wambaugh v. Gates*, 8 N. Y. 138, the doctrine contended for, that title obtained at a sale under a decree authorizing it, which is subsequently reversed by an appellate court, is subverted by the reversal, is simply assumed, with no argument or authority to support it.

Whatever may be thought of the correctness of the main position asserted in these cases, it does not follow that grantees from purchasing parties stand in the same position, but the contrary is plainly inferable from them. And this is consonant with authority and good reason.

In *Lovett v. German Ref. Church*, 12 Barb. 67, the contest

was as to who were the rightful officers of a certain church corporation. The first party, having by a decree of the chancellor been declared the rightful officers, under authority given them, executed a mortgage and confessed a judgment. After this, the second party appealed from the chancellor's decree and it was reversed, and they were restored. In a suit brought to foreclose the mortgage given, while the first set of officers were acting, it was held that such mortgage was a valid lien. The court says: "Indeed, unless the decree of a court of competent jurisdiction protects third persons not parties to the suit, dealing with the successful party on the faith of the decree, no judgment can be of any avail until it shall have received the sanction of the highest tribunal of the land, or until the time for appealing shall have expired."

The rights of third parties are well expressed by Bronson, C. J., in *Langley v. Warner*, 3 N. Y. 327. In that case, Walsh recovered a judgment against Langley, upon which execution issued and money collected. By agreement between Walsh and his attorney, Warner, the money was paid by the officer to the latter to apply on account for services. On review by the appellate court, the judgment was reversed and restitution ordered. Langley, being unable to collect the money from Walsh on the order of restitution, brings an action against Warner. Having succeeded in the court below, the case was reversed in the court of appeals. The learned judge, in delivering the opinion of the court, among other things remarks: "I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money; he has got nothing but his own. Walsh had a perfect title to the money when it was collected, just as perfect as it would have been if no *certiorari* had been issued. He had a right to do what he pleased with the money, and he made a very proper use of it by paying his debts. The plaintiff has taken up the strange notion that because he was trying to get the judgment reversed Walsh could not give a good title to the money, especially if he paid it to one who knew what he was trying to do. I am not aware of any foundation for such a doctrine. As Walsh had a good title to the money, he could, of course, give a good title to the defendant or any one else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous, and would be reversed. The legal presumption was the other way, that the judgment was right and would be affirmed. But if the judgment had been

known to be erroneous, the pendency of the proceedings in error could not affect in the least degree the title of Walsh to the money. Nothing short of a reversal of the judgment could destroy or impair his right."

In *Gray v. Brignardello*, 1 Wall. 627, in the supreme court of the United States, it is laid down: "It is a well-settled principle of law that the decree of a court which has jurisdiction of the person and the subject-matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts; but its adjudication when made concludes all the world until set aside by the proper appellate tribunal; and although the judgment or decree may be reversed, yet all right acquired at a judicial sale while the decree or judgment was in full force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made, and authorized the sale. With the errors of the court he has no concern."

Numerous other cases might be added, some declaring the doctrine generally and without exception; while all agree that, as to third parties, rights acquired under a judgment of a court of competent jurisdiction are not affected by the reversal of such judgment. Third parties include as well those who may acquire their rights through a party to the suit, while the judgment is in force, as those who purchase immediately at the sale. The grantee of such party to the suit buys from one who obtained title through one of the best known sources. At the time of his purchase no appeal may have been taken, and he has no right to expect there will be. If an appeal has been taken, he is not to suppose that the judgment will be reversed, but the contrary rather. Notwithstanding, as in the case of *Hubbell v. Broadwell*, 8 Ohio, 120, referred to by counsel, courts may, on reversal of a judgment or decree, regard it as most consonant with justice to hand back the identical land, if yet in possession of a party; still, until reversal, it cannot be denied that the party purchasing under the decree or judgment has as good a title as a third person, and if he conveys, transfers as complete a title as would be taken by a third party directly at the sale. Both parties take under the same judgment or decree, and while it is in full force the law protects both equally.

In this view of the point raised, PunDT and Koenig took

from Green a title to the Farnham Street lot, unaffected by the reversal of the decree in the case against Brown and Jones.

The discussion under this head has thus far proceeded upon the assumption that had Green retained the title to the Farnham street lot until the reversal of the decree under which he bought, Jones would have been in as of his former estate. This was conceded by counsel for appellee, and, as I understand, agreed to by a majority of the court. As for myself, I prefer to go one step further, and hold that Green, as plaintiff in the suit, under the decree on which he purchased, took a title no more affected by a reversal of the decree than though he had been a stranger. This I regard the better ground, and in harmony with well-established principles of law. With the concession that a stranger to the suit would take a title unaffected by the reversal of the decree, as a legal conclusion, it follows with mathematical certainty that the party to the suit who might buy at the same time, taking under the same decree and same proceedings and instrument, must take a like title, unless there be some controlling consideration opposed. After some examination I have been unable to find any such reasons or considerations. Those assigned in the opinion in the case of *Hubbell v. Broadwell*, *supra*, seem unwarranted, and are far from being satisfactory. There, it is seen, the positive terms of a statute which declares that "such reversal shall not defeat the title of the purchaser," are disregarded, and a party to the suit is excepted from its protection because he is "a party to the errors, and it seems most consonant with justice to restore the land to its owner." To say nothing of a want of authority to summarily override a plain statute, is the reason well founded in fact? Is the rule following it a safe one to adopt and apply with the uniformity which should characterize all legal rules? There is no law prohibiting the party to a decree to bid at a sale under it. He becomes a purchaser when he bids more than a stranger. If he is not to have the same protection for his title, his bidding is discouraged, and to this extent the defendant, in a decree or judgment, is liable to have his property sold at a diminished price. If the property, as in the case before us, is a building lot, the value of which consists in affording a place to erect a building, should the party purchaser be required to hold the property at great expense for years perhaps, to await the final result of an appeal, before he can make any use of it? If he

is to build, is he to receive any consideration for his improvements? On the other hand, and it is said to be a poor rule that does not "work both ways," suppose the property purchased by him to consist of valuable buildings, which by accident have been destroyed, is justice satisfied by returning to the original owner the lots and ashes? Or should the property be timbered or mining lands, will it do for the party purchaser to strip them of the timber or minerals, and return the worthless soil? I know of no power in a court of equity to stop him who is possessed of a sheriff's title, under a judgment in full force, from cutting timber or extracting minerals from lands purchased, even though he be a party to a judgment or decree. This must be because in law he has the valid title. The law has provided against all this by allowing execution to be stayed by a proper bond.

These are but few of many queries which naturally suggest themselves, and which must show the working of such a rule very complicated, and anything but in consonance with justice. No force is given to the rule to say that he is a "party to the errors." If it be the errors which invalidate, they must operate against strangers as well.

The real ground assumed is, that as a party in possession it is the easier and simpler way to "square up" by handing back the identical land. This we have seen is a very uncertain and inequitable rule. To pursue the fruits of the sale, to have a return of the money for which the property sold, affords at once a fixed and invariable rule, and against which I can perceive no good objection. In presumption of law, the property being sold at public sale brought its value. The sale was permitted by the defendant by not filing his *supersedeas* bond. The plaintiff, under the law, is at liberty, alike with strangers, to bid and purchase under the authority of the decree, and should have equal protection. Any errors which may have intervened are the errors of the court with which he has no concern. In case of no reversal, the defendant is benefited by the plaintiff being a purchaser to the extent that he may have raised the price of the property sold. The only other objection I have heard or have been able to discover is the loose expression thrown out in some cases where the right of third parties or strangers to the suit are referred to, that such rights are upheld; because such rule is calculated to encourage bidding, from which the inference is drawn that parties to the judgment are not within the policy. This is fallacious. We

acknowledge a sad weakness in solemn decrees and judgments of courts of unlimited jurisdiction, standing in full force, if they are subject to considerations of policy and convenience. No encouragement to bidding is an incident or result following the reliance or confidence which is always given to the face of judgments and decrees pronounced by courts of competent jurisdiction, while such judgments and decrees stand in force and are unreversed. Such expressions no doubt take their origin from *Manning's Case*, 8 Coke, 94, where it is said: "If upon his judgment the plaintiff takes out a *fieri facias*, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the term was sold, and not the term itself; for by the writ the sheriff had authority to sell, and if the sale might be avoided afterwards, few would be willing to purchase under execution, which would render writs of execution of no effect": Bac. Abr., tit. Executions, 2; Roll. Abr. 778; *Eyre v. Woodfine*, Cro. Eliz. 278; *Anonymous*, Moore, 573; *Gresham's Case*, Leon. 89; *Doe v. Thorn*, 1 Maule & S. 425. It will be remarked that the principle asserted here is, that the stranger's title to the term for years rests upon the fact that "by the writ the sheriff had authority to sell," and what is said about purchasers being unwilling to buy if the rule were otherwise is simply in commendation of the rule, and not the rule itself or the ground on which the rule rests.

This case, it will also be remarked, speaks of the sheriff "selling to a stranger," and seemingly makes a distinction in his favor. This is cited in many of the cases which maintain the rights of third parties, or strangers purchasing at judicial sales, and the inference has been drawn from the language used that parties to the suit fall without the protection given by the law to strangers. Such use has been unwarranted and indulged in without examination. The sale of lands under execution was unknown to the common law. Such sale would have been an invasion of the feudal principle then existing, which prohibited the sale or alienation of lands. Under the statute of Westminster 2, 13 Edw. I., c. 18, the writ of *elegit* was given by which the defendant's goods were appraised and delivered to the plaintiff. If this were not sufficient to satisfy the judgment, then a moiety of his lands were passed to the plaintiff to hold until out of rents and profits thereof the debt was levied: 3 Bla. Com. 418. We can readily see that where no title passes, but the lands are held

to satisfy a judgment given, upon a reversal of such judgment the lands should be returned to the defendant. This is illustrated in Tidd's Practice, vol. 2, p. 1138. "But if a man recovers damages in a writ against B, and have an *elegit* of his chattels and a moiety of his lands, and the sheriff upon this writ deliver a lease for years of the value of fifty pounds to him, that recovered *per rationabile pretiurn et extentum habendum* as his own term, in full satisfaction of fifty pounds, part of the sum recovered; and after B reverse the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet here it is no sale to a stranger, but a delivery of the term to the party that recovered by way of extent, without any sale, and therefore the owner shall be restored: Bac. Abr., tit. Executions; *Goodyere v. Ince*, 2 Cro. Jac. 246. That it would be otherwise if sold to a stranger, who of course parts with his money, is true: Selw. 108; Bac. Abr., *supra*.

Without pursuing this discussion further, to me the rule contended for by counsel seems without reason to sustain it, and no doubt to a great extent was induced by a misapprehension of the authority cited in its support. The true rule, and the one I believe will be established generally, is, that the title acquired under judicial sale is equally good, whether taken by a party to the suit or a stranger, and not affected by a reversal of the decree or judgment in the hands of one any more than in those of the other.

Counsel makes the further objection, that as vendees in possession under contract with Hughes, and through him under Jones, PunDT and Koenig could not allege their purchase of the outstanding title against him or his grantors. For the purpose of answering this objection, we may regard the duties and obligations of a tenant paying rent, and a vendee in possession under a contract for the purchase of the premises, the same, resting upon that principle of equitable estoppel which forbids a person denying a title by recognizing which he was permitted to take possession: *Mattis v. Robinson*, 1 Neb. 3.

This rule, however, must be confined to the title of the landlord or person contracting to sell, had at the time such possession is given. Subsequently to making the lease or contract of sale, the lessor or vendor might sell the premises. In that case, I see nothing to forbid the tenant or vendee in possession from recognizing or treating with him, to whom the vendor or landlord had sold. What the vendor could himself volun-

tarily do, the law can as effectually accomplish in cases falling within its authority. In this case, Pundt and Koenig did not question the title of Jones. Other parties did, and the court adjudged that he had no title, and ordered the premises sold as being, in fact, those of Brown. After Green had obtained the complete legal title, there was nothing in the way of Pundt and Koenig bargaining with him. It is well settled that a tenant is not estopped from showing that the interest of the lessor has passed from him by his own conveyance or by sale under judgment against him: Bingham on Real Estate, 210. The tenant himself may become purchaser at such judicial sale: *Despard v. Walbridge*, 15 N. Y. 377. It follows, then, that Pundt and Koenig, after the reversal of the decree made in the case of Green and others against Jones and Brown, were possessed of a good title to the Farnham Street lot from a source other than from or through Hughes, and that the consideration for which they were to convey to him the Douglas Street lot was gone, and they accordingly relieved from their obligation to convey. It was then that Redick and Briggs obtained a release from Jones of his interest in the Farnham Street lot. It has been shown that Jones, in fact, had no remaining interest in it. Whether Redick and Briggs knew this, or whether they supposed that by the reversal by the United States supreme court of the decree Jones was invested with his original title, it matters not. They bought evidently on their own behalf, and not as the representatives or assignees of Hughes. Hughes had years before abandoned his contract. With this pretense of title from Jones, Redick and Briggs approach Pundt and Koenig and obtain the Douglas Street lot in consideration of their release to them of this assumed interest in the Farnham Street lot. Whether Redick and Briggs believed that, through the reversal aforesaid, they were seised of a good title to the Farnham Street lot, or whether, thinking it a question of some doubt, the parties compromised upon an arrangement which gave Redick and Briggs the Douglas Street lot, or whether, knowing they took nothing under the Jones release, but using the release as a pretext, exercised sharp practice upon Pundt and Koenig, I deem it unnecessary to inquire; and although in getting this property in question they followed in the order of the several contracts enumerated, it is clear Redick and Briggs did not in fact act as the assignees of Hughes, following those contracts. They acted independently

of them, and while they undoubtedly used a knowledge of them to their own advantage, it is their own good fortune, and cannot avail the appellants.

I have thus briefly reviewed the more important points presented and very ably argued by counsel. There are other grounds still upon which the dismissal of the bill might properly have rested. At the very threshold of his application to a court of chancery, the complainant stood confronted by several rules which have controlled courts of equity in denying relief of the kind sought here. Beyond what would have seemed profitable to him, McAusland performed none of the obligations of his contract with Hughes. The notes expressing the price to be paid for the Douglas Street lot were never paid, not a cent of principal or interest. The taxes which he undertook to keep down were left unpaid; and the place was allowed to be sold, and had to be redeemed by PunDT and Koenig. More than this, McAusland is shown to have been insolvent; and had Hughes sought to collect the notes, he would have been unsuccessful. Again, the property, which at the time of making the contract was worth but five hundred dollars, and which remained so, or of even less value, for several years, afterwards grew rapidly in value till worth several thousand dollars. A court of equity will not lend its aid in case of gross negligence: *Fordyce v. Ford*, 4 Bro. C. C. 497. Nor will it allow parties to lie by, with a view to see whether a contract will prove a gaining or losing bargain, and, according to the event, either abandon it, or, considering the lapse of time as nothing, claim a specific performance: *Alley v. Deschamps*, 13 Ves. 228; unless the complainant has taken all the pains he could to be ready to carry into execution the agreement: *Guest v. Homfray*, 5 Id. 822; nor unless he has shown himself ready, prompt, and eager: 5 Id. 720, Sum. ed., note 2; nor must there have been a change in circumstances affecting the character and justice of the contract: *Pratt v. Law*, 9 Cranch, 456, 493. The rules, as announced in these cases, the record shows the complainant to have violated, unless he stands relieved by the excuse offered by his counsel; that is, because Hughes did not hold the title to the lot which he agreed to convey with warranty; and whether he ever could get it, being contingent upon the suit between Green and Jones, McAusland was excused from paying his notes at their maturity. This hardly satisfies. The suit involving Jones's title was pending when the several contracts were

made. McAusland was constructively advised of it, as there is no doubt he was in fact. He seems to have provided against an adverse determination of that suit by taking the guaranty of Sahler & Co. for some two thousand dollars. The notes were negotiable which were given on the making of the contract, and had McAusland been of sufficient responsibility, they could have been transferred and collected. The prospect of a good title, or the guaranty of Sahler & Co., seems to have been a sufficient warrant for him to erect a cheap building on the premises. To my mind, all these circumstances are evidence that McAusland well knew the fact that Jones's title was in litigation, and that he bargained and acted with reference to it. But after putting on a cheap building, and the property not appreciating for a time in value, he no doubt found it profitable and convenient to pay nothing on the purchase price, and to occupy the place for a terms of years without the payment of rent and taxes. At last he asks that he be allowed to pay the five hundred dollars which should have been paid years ago, and take a place worth as many thousand. This would be a good enterprise; and if it could have the favor of this tribunal, the courts would swarm with applicants eager to engage in like speculations. The decree rendered in the court below must be affirmed.

Judgment affirmed.

LACHES AS GROUND FOR DENIAL OF SPECIFIC PERFORMANCE: See *Bennett v. Welch*, 87 Am. Dec. 354, and note 358.

EFFECT OF REVERSAL OF JUDGMENT ON TITLE TO PROPERTY SOLD THEREUNDER: See *Carson's Adm'r v. Suggett's Adm'r*, 86 Am. Dec. 112, and note 114.

ESTOPPEL OF TENANT TO DISPUTE LANDLORD'S TITLE does not reach beyond particular title under which he entered: *Bettison v. Budd*, 65 Am. Dec. 442, and note 452.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

MAVRICH v. GRIER.

[8 NEVADA, 52.]

ONE WHO TAKES CONVEYANCE OF REAL ESTATE IN TRUST FOR MARRIED WOMAN MAY MORTGAGE the same to secure the payment of the purchase-money, where the deed and mortgage are executed at the same time, and form part of the same transaction.

CESTUI QUE TRUST IS NECESSARY PARTY TO SUIT FOR FORECLOSURE of a mortgage executed by a trustee upon the trust estate; and if such *cestui que trust* be a married woman, her husband is also a necessary party.

PREVAILING PARTY IS ENTITLED TO HIS COSTS ON APPEAL, although the error for which the judgment below is reversed is merely technical, and his defense seems to be frivolous, and merely for delay.

APPEAL. The opinion states the case.

C. E. De Long, for the appellant.

David Bizler, for the respondent.

By Court, BEATTY, C, J. In the month of May, 1863, Harriet Smith, a *feme covert*, entered into a contract with the plaintiff for the purchase of a house and lot in Virginia City.

The transaction was consummated by a conveyance of the lot from the plaintiff to J. W. Grier, to be held in trust for Harriet Smith. At the same time, and as a part of the same transaction, Harriet Smith executed and delivered to plaintiff her promissory note for two thousand dollars, bearing interest from date at four per cent per month, and due October 1, 1864, as the price of the house and lot. As a part of the same transaction, a mortgage was executed and delivered to plaintiff. The mortgage commences with this recital: "This

indenture, made the 15th of May, between John W. Grier, trustee of Mrs. Harriet Smith, of and Paul Mavrich," etc. Then follow the usual words of conveyance, description of property, etc., and then follows the following recital:—

"This conveyance is intended as a mortgage to secure the payment of the sum of two thousand dollars, the purchase-money of said lot, the same being a note bearing interest at four per centum per month," etc.

The mortgage is signed by Harriet Smith and John W. Grier.

For a while the interest was paid on the note. Afterwards the interest ceased to be paid; and the time of credit having expired, the plaintiff filed his bill to foreclose the mortgage. Grier and Harriet Smith alone were made defendants.

The defendants answer, and the only material facts they state in the answer are these: That at the time of the original transaction Harriet Smith was a married woman, and her husband was then living within the jurisdiction of the court; that she was still a married woman, living with her husband within the jurisdiction of the court, and always since the beginning of the transaction had been a married woman, so living with her husband within the jurisdiction of the court. On the trial, she proved satisfactorily that she was a married woman, and her husband was within the jurisdiction of the court.

The court, without making the husband a party, entered a decree for the sale of the mortgaged property. From this decree defendants appeal. They make several points in the case which, it appears to the court, scarcely require notice; yet, as they seem to be relied on in good faith, we will here dispose of them.

It was contended that the mortgage cannot be enforced, because Mrs. Smith, as a married woman, could not bind herself either by note or mortgage. It is true, Mrs. Smith could not make a valid and binding contract; her note was not an instrument upon which she could be sued in a court of law. The mortgage does not purport to be her deed. Her signature to it is mere surplusage. The deed was made to Grier, and he executed at the same time a mortgage to secure the purchase-money. This he had a right to do, and the property was thereby bound, and not the less so because Mrs. Smith had made a void vote. He describes himself therein

as the trustee of Mrs. Smith, which was proper and enough; but we cannot see that the mortgage would have been less valid if he had not so described himself. He took the legal title from the plaintiff, and he had the power to mortgage that title to secure the purchase price of the land. The interest of Mrs. Smith, as *cestui que trust*, was subordinate to the mortgage.

We hardly suppose that counsel is serious in his objection that Grier could not act as trustee of Mrs. Smith, because he had not been appointed as such by any lawful authority. We know of no other authority necessary to make a man trustee for another than the will of the grantor who executes the deed of trust and the grantee who accepts it. The objection to the non-joinder of parties is more serious. It seems to be well settled that in a bill to foreclose a mortgage against a trustee, the *cestui que trust*, as the party beneficially interested, must be made a party: See Story's Eq. Pl., secs. 207, 209, and cases there cited.

Mrs. Smith, then, although not properly a party to the mortgage, was a necessary defendant. When a married woman is a necessary defendant, it seems equally clear that the husband should also be a party to the suit, and joined with her; unless, indeed, when his interests are adverse, in which case he might be a plaintiff.

It is true that it has sometimes been contended that where the wife's interest is entirely distinct from that of her husband, and the litigation is about her separate property, that the husband need not be joined. But all the cases cited in support of this doctrine seem to be cases where the husband was without the jurisdiction of the court, or there was a deed of separate maintenance between the parties, or some other special reason for it. When there is no difficulty in bringing the husband in, we think the court should not proceed to a decree before he is brought into court: See Story's Eq. Pl., secs. 61, 63.

The judgment of the court below is therefore reversed, and the cause remanded.

The court below will cause the husband of Mrs. Smith to be made a party defendant, and upon his answering or suffering default, will proceed to enter the proper decree in the case.

As the defense in this case seems to be frivolous, and merely for delay, and the error on which the case is reversed merely technical, we will not allow costs to the appellant; but the

costs in this court shall abide the final result of the suit in the court below.

LEWIS, J., did not participate in this decision.

Upon petition for rehearing or modification of the judgment in the foregoing case, the following order was made:—

By Court, LEWIS, J. In reversing the judgment of the court below in this cause, it was ordered that the costs on appeal should abide the final determination of the action. Upon this, the appellant petitions for a rehearing, or a modification of our order in this respect. We are satisfied, upon reflection, that the appellant should recover his costs upon this appeal, and that our first conclusion was incorrect. The judgment of this court must, therefore, be so modified as to allow the appellant his costs upon this appeal.

BROSNAN, J., did not participate in this order.

ADMINISTRATOR HAS NO AUTHORITY TO MORTGAGE DECEDENT'S REAL ESTATE: *Green v. Sergeant*, 56 Am. Dec. 88. A trustee authorized to sell real estate has no power to exchange the trust property: *Ringgold v. Ringgold*, 18 Id. 250.

CESTUI QUE TRUST IS NECESSARY PARTY TO SUIT FOR FORECLOSURE of mortgage on the trust property: *Bardstown and Louisville R. R. Co. v. Metcalfe*, 81 Am. Dec. 541.

LUCICH v. MEDIN.

[3 NEVADA, 92.]

PROCEEDING IN PROBATE IS IN ITS NATURE DISTINCT FROM ACTION AT LAW or a suit in equity, notwithstanding the fact that the same court has jurisdiction in common law, chancery, and probate cases.

ERROR IN NAMES OF PARTIES TO PETITION IN PROBATE PROCEEDINGS may be corrected by an amendment. And where a petition is irregularly presented by the attorneys of the legatees in their own name instead of the name of the legatees, this error may be corrected by substituting the names of the legatees for those of the attorneys.

WASTE, NEGLIGENCE, AND MISMANAGEMENT ARE AS GOOD GROUNDS FOR REMOVING EXECUTOR as actual fraud or embezzlement.

EXECUTOR WHO FAILS TO DO WHAT IS NECESSARY TO PROTECT ESTATE should be removed, although he may have abstained from doing anything actually wrong.

EXECUTOR MAY EMPLOY COUNSEL TO DEFEND INTERESTS OF ESTATE, when it is involved in litigation. But he has no right to employ counsel at the expense of the estate to do what he himself should do, and for the doing of which he is compensated by his commissions.

SETTLEMENT OF ACCOUNT IN PROBATE PROCEEDINGS IS ONLY RES JUDICATA as to those matters actually embraced in the account; and where a mistake appears in a former settlement, it may be corrected in a subsequent one.

PROBATE COURT MAY CORRECT ITS OWN ERRORS IN SETTLEMENT OF ACCOUNTS at any time before final settlement, provided the correction can be made from the face of the record without opening the proof as to the accounts allowed. But if the mistake or error is only to be shown by going anew into the proof, the account cannot be reopened.

EXECUTOR HAS NO POWER TO COMPROMISE SUIT PENDING AGAINST ESTATE of his testator without the consent of the probate court.

WHEN PARTY WHO IS CO-TENANT OF HIS TESTATOR PAYS MONEY TO COMPROMISE SUIT affecting the common property, without seeking the advice of the probate court, he will be held to have paid it as co-tenant, and not as executor.

EXECUTOR HAS NO RIGHT TO BORROW MONEY FOR ESTATE of his testator, unless expressly authorized by the will.

EXECUTOR HAVING MINING STOCK LIABLE TO ASSESSMENT SHOULD OBTAIN ORDER OF COURT TO SELL IT, or if the estate be surely solvent, turn it over to the legatees; but he has no right to borrow money to pay the assessments.

APPEAL. The opinion states the case.

C. E. De Long and W. H. Rhodes, for the appellants.

Williams and Bixler, for the respondents.

By Court, BEATTY, C. J. In this case, a petition was filed by Luca Jacovich and Dodato Milinovich against Marco Medin and Vincent Milatovich, executors of Marco Milinovich, deceased. The petition is headed, "In the Matter of the Estate of Marco Milinovich, Deceased." In a subsequent stage of the proceedings, by leave of the court, the names of both these petitioners were struck out from the title of the petition, and the following names were inserted in lieu thereof: "Andreane Lucich, Andrew Milinovich, Bogdan Milinovich, and children of Marietta Barbarovich, deceased, John and Andreane Barbarovich, legatees."

The petition shows that Marco Milinovich died at Virginia City, on the fifteenth day of July, 1863, leaving Marco Medin and Vincent Milatovich his executors, who subsequently qualified as such. It further shows that Andreane Lucich and the others who were substituted with her as petitioners were the residuary legatees of decedent's estate, both real and personal. The petition further shows that all the residuary legatees are foreigners, not residing in the United States, and that the original petitioners were the agents or attorneys of the legatees. The petition then alleges that the executors never filed a joint

inventory, but that Medin only filed a separate inventory on the — day of —, 1863, showing property to amount of about \$27,857.50. The other executor never filed any. Letters testamentary were issued to Medin in 1863, and to Milatovich about the 1st of July, 1864. No joint accounting has ever been had by said executors with the estate.

It is further charged that Medin's inventory was not correct, true, or complete. It charges him with fraudulent suppression and concealment of certain property. It charges him with fraud in a settlement made with the probate court in February, 1865. It sets out many particulars in which the settlement is fraudulent, and winds up with the following prayer:—

"Wherefore, the premises considered, your petitioners respectfully pray that the said executor be cited to appear and show cause why he shall not be compelled to file a further inventory of the property of said estate, and to show cause why the settlement of said accounts above referred to should not be set aside, annulled, and revoked. Your petitioners further pray the court that said executor be immediately ordered to file *de novo* full, true, and correct accounts of all property of said estate, real, personal, and mixed, which has come to his knowledge or possession; of all moneys received or paid out in behalf of said estate; and that he be ordered to bring into court proper and satisfactory vouchers for all sums disbursed; and your petitioners pray the court for all such other and further relief as may be just and proper."

The court below went into proof as to the various allegations in the petition, came to the conclusion that there were some mistakes in the settlement of the executor Medin, but no fraud, and dismissed the petition. The petitioners moved for a new trial, which was denied, and appeal to this court from the judgment or order of dismissal, and from the order refusing a new trial.

Upon the argument of the case in this court, one of the points most seriously urged by the respondents is, that the petition does not state facts sufficient to entitle the petitioners to the relief sought. This brought up the question whether this petition might not be treated as a bill in equity. The petitioners insist that the district court, having equity jurisdiction, and the facts in this case stated being such as to require the interposition of a court of equity, the proceeding may be treated as a suit in equity, and a decree rendered giving such equitable relief as the proof in the case will justify.

We think the counsel for petitioners are not correct in this position. Although the district court has jurisdiction in common law, chancery, and probate cases, yet the proceedings in each are separate and distinct, at least a proceeding in a probate case must in its very nature be distinct from an action at law or a suit in chancery. Under our practice an equitable defense may be set up to an action at law, and in this way the common-law and chancery practice become to some extent blended in the same case. In other respects the proceedings in chancery, at common law, and in probate courts are distinct; and the proceedings in one class of cases should not be mixed up with those of another.

This, it appears to us, was peculiarly a proceeding in the probate court, and had none of the characteristics of a suit in equity. If it were a suit in equity, there would be a fatal objection to it. It would be a bill to set aside the settlement and accounts of an executor who has not yet made his final settlement with the probate court. This, it appears to us, would be very objectionable. A court of equity certainly has the power to inquire into the final account of an executor, and proceed to hear evidence to falsify and surcharge the account for fraud, and to render such decree as is necessary to do equity in the case.

But if any bill has ever been sustained against an executor to falsify and surcharge an account not final, it has escaped our observation, and we are not referred to any such in the brief of counsel.

We think such a practice would be extremely inconvenient. If indulged, it might result in having several bills pending between the same parties at the same time, regarding the settlement of a single estate. There would certainly have to be something extraordinary in the case before a court of equity would countenance such a proceeding.

We must, then, consider this as a proceeding by petition in the probate court, and endeavor to see to what relief the petitioners are entitled. The petition was presented in the first place rather irregularly by the attorneys of the legatees, in their own name instead of the name of the legatees. Whilst this was irregular, it was not, perhaps, fatal to the petition.

The petition is entitled, "In the Matter of the Estate of Marco Milinovich, Deceased." Such an estate was in course of settlement before the court; an error in the parties to the petition was such an error as we think the court might amend,

and properly did amend, by substituting the names of the legatees for those of the attorneys. It is not like bringing a suit in the name of the attorney instead of the principal, which would be such a fundamental error as could probably only be remedied by bringing a new suit in the name of the proper parties. If we look at the facts stated in the petition, we think it shows abundant grounds for asking the interposition of the court to protect the estate from utter waste and destruction. The prayer of the petition does not appear to have been framed with a view to the exact relief which a probate court could have given under the existence of a state of facts such as is stated in the petition.

Section 115 of the probate act is as follows:—

“Whenever property not mentioned in any inventory that shall have been made shall come to the possession or knowledge of an executor or administrator, he shall cause the same to be appraised in the manner prescribed in this chapter, and an inventory to be returned within two months after the discovery thereof; and the making of such inventory may be enforced after notice by attachment or removal from office.”

The first part of the prayer is certainly directed to the relief provided in this section, and the allegations of the petition and the proof equally show that the court should have ordered a new inventory.

Sections 226, 227, and 228 of the probate act, read as follows:—

“Sec. 226. Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts, showing that it is necessary and proper that such an exhibit should be made.

“Sec. 227. If the judge be satisfied, either from the oath of the applicant, or from any other testimony that may be offered, that the facts alleged are true, and shall consider the showing of the applicant sufficient, he shall direct a citation to be issued to the executor or administrator, requiring him to appear at some day to be named in the citation, which shall be during the term of the court, and render an exhibit as prayed for.

“Sec. 228. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objection in writing contest any account or statement therein

contained. The court may examine the executor or administrator, and if he has been guilty of negligence, or has wasted or embezzled or mismanaged the estate, his letters shall be revoked."

Under the provisions of these sections, if the allegations of the petition are true, the executors should have been cited to appear, and if it was shown by the evidence that the executors had been guilty of negligence, waste, embezzlement, or mismanagement of the estate, they should have been removed. The final settlement of the accounts with the executors should have been made, and they ordered either to pay over the money and estate to the legatees, or to an administrator with the will annexed, as the case might require. The transcript contains neither the will of decedent, the inventory of the effects, nor the powers of attorney of those parties who are representing the legatees. In the absence of these necessary documents, the court cannot say what order should be made in the premises.

The transcript before us contains over three hundred pages; nearly three hundred of it is taken up with the testimony. The handwriting is not very legible, and we will not attempt to say whether the charges of fraud have or have not been sustained. To determine this point would require a careful weighing of the testimony, which would be very difficult with such a transcript. It is certain, if the evidence for the petitioners is true, there have been gross and outrageous frauds practiced. But on the other hand, this evidence is contradicted in all material points by that of respondents. We think the court below, on a rehearing, will be better able than ourselves to weigh this evidence, and accept what is probable, and reject what is improbable and not entitled to credit.

But outside of the question of fraud, there are other questions which it is proper for this court to pass on. Waste, negligence, and mismanagement are equally as good grounds for removing executors as actual fraud or embezzlement.

In this case, one of the executors has totally neglected his duties as such. He appears to have done really nothing. If one qualifies as executor, it is not enough that he fails to do anything actually wrong; he must do what is necessary to protect the estate, or he should be removed.

The other and managing executor has certainly wasted and mismanaged the estate in almost every conceivable way.

When he came into possession of the estate he found \$1,480

in gold belonging individually to the testator, besides his share of cash on hand in saloon, amounting to \$443.75, in all \$1,923.75.

Decedent also had a half-interest in liquors to the value of \$4,758.36 at invoice price, if we understand the testimony; or if that was not the invoice price, it was the invoice price with the freight added. These were readily salable at the cost price, and perhaps something more, so that he had what was equivalent to at least four thousand three hundred dollars in cash. He also came into the possession of real estate which was producing a monthly rental of about five hundred dollars. The estate did not owe, apparently, a dollar, except the expenses of testator's last sickness, which only lasted about fifteen days. At the end of nineteen months the personal property is all gone, and the acting executor brings out the estate as \$5,341.22½ in debt to himself, having in the mean time paid legacies to the amount of \$3,538. In other words, he brings the estate in debt to himself some eighteen hundred dollars over and above what he has paid to the legatees.

This certainly suggests to the mind at once some mismanagement of the affairs of the estate by the executors. If we examine the items of expense in detail, that impression certainly is not removed.

When the testator died he was half-owner of a drinking-saloon, which, it seems, made a profit of nearly nine hundred dollars in the fourteen or fifteen days during which he was sick. After his death, the executor Medin, who was also part owner of the saloon, made haste to sell the same, nominally, to Mark Lovely and Spiro Vicanovich. He did not wait to qualify as executor; he did not have any appraisement of the stock on hand by any reliable and accessible person. He did have it appraised by a Mr. Dougherty, but he was not a resident of the state, and was not produced in the trial of this motion in the court below. While the sale of the saloon was made nominally to Lovely and Vicanovich, there is certainly testimony enough to show that Medin himself was the real purchaser of at least one third of the establishment, and indeed, some testimony tending strongly to show that Lovely was then an agent of Medin, and that neither he nor Vicanovich paid anything for their interest in the saloon at the time of the sale; that the business was carried on with the means of testator, and nothing paid to Medin except the proceeds of sales from the liquors until he was paid up. This was certainly neither

a prudent nor commendable method of proceeding. It is, to say the least of it, calculated to throw suspicion on his conduct and motives.

Mr. Medin selects Mr. Dougherty as the appraiser, but he is at once the purchaser and the seller. His flimsy attempt to show that he only came into the concern after Lovely bought it is only calculated to make his motives the more liable to an unfavorable interpretation.

When at a subsequent period he qualifies as executor, instead of stating the amount of money and liquors on hand in the saloon in which testator had a half-interest, he only returns \$1,295.47 as the net proceeds of testator's share, thus swallowing up more than half of the testator's share, without any showing of what had become of it.

He makes the funeral expenses of the testator (a saloon-keeper in fair circumstances, but not very wealthy) over twelve hundred dollars. He pays large assessments on mining stocks without any order of the probate court for so doing. He charges interest for money he probably never borrowed, or if he did borrow it, it was without the shadow of authority, so far as shown by this transcript. What authority he may have derived from the will of the testator or the powers of attorney of the legatees we know not. He paid one attorney five hundred dollars for nothing that we can see, unless it was for advising him how to squander the estate. He pays, or claims to have paid, another the same amount for compelling himself to admit his co-executor to a participation in the management of the estate.

When an estate is involved in litigation, an executor has a right, and it is his duty, to employ counsel at the expense of the estate to defend its interests, but he has no right to charge the estate with the expense of counsel for doing what he himself should do. An executor is paid a percentage for keeping the accounts and attending to the ordinary affairs of an estate. If he is so ignorant as not to be able to do this himself, he must out of his percentage pay for the necessary assistance.

In this case, the estate was involved in no litigation requiring the employment of counsel, except the litigation about the title to real estate. For that there is a separate charge, distinct from the two items of five hundred dollars each, to which we have alluded. We have alluded to all these extravagances to show the necessity for immediate action on the part of the probate court.

That court should immediately order the executors to file an account making a full showing of all the property and assets that have come to their hands up to the date of filing such account. The court should cause a settlement to be made with the executors, and all proper orders made to stop the unnecessary waste of the estate. Without the will before us, we cannot tell what are the necessary orders to be made. Whether the estate shall be distributed among the legatees and devisees, placed in the hands of an administrator with the will annexed, or continued in the hands of the present executors, with such orders about the management of the estate as will stop the reckless expenditures heretofore indulged in, we cannot determine from the transcript before us.

One of the great difficulties presented to our minds in disposing of this case is, to determine what the probate court may review, determine, or adjudicate when the case goes back for trial.

Section 239 of the probate act seems to provide that what is adjudicated in one settlement of an executor's or administrator's account shall not be open to adjudication in any future settlement in the probate court.

That a final settlement with an executor or administrator is, and ought to be, considered *res adjudicata*, and not open to further question, except when a bill in chancery is filed charging fraud, is a well-settled principle; but to hold that a partial and incomplete settlement should preclude the probate court from further examination of the executor's accounts seems, to say the least, rather inconvenient. In obedience, however, to what appears to be the plain letter of the statute, we must so hold. But in holding that a partial account, acted on by the probate court, is to be considered as *res adjudicata*, we have high authority for saying it is only to be so treated as to those matters which the account and the decree of the court show were fairly before the court for adjudication. The general result at which the court arrives, even in a final settlement, is immaterial. If the probate court finds, for instance, that an executor has properly paid out all the estate that came to his hands, this will not prevent one interested in the estate from proceeding in the probate court to compel the executor to account for property not mentioned in his account.

The settlement of an account is only *res adjudicata* as to those matters actually embraced in the account. For this

principle, see the very sensible opinion of Chief Justice Shaw in the case of *Field v. Hitchcock*, 14 Pick. 405.

It has also been held that where a mistake appears in a former settlement, it may be corrected in a subsequent one: 1 Pick. 159, 160.

It may be difficult to determine, under this latter rule, where the line is to be drawn as to that which may be corrected as a mistake and as to that which shall stand as *res adjudicata*. It would at least be safe, if anything is to be corrected which has once been passed on, to say everything is liable to correction which shows upon its face that it is erroneous; that there has been a mistake either of fact or law as to that item.

This would allow the court, at any time before final settlement, to correct its own errors, but not to reopen the proof as to accounts allowed, except perhaps in cases where the account showed error on its face, but did not show (without explanation) the extent of the error.

So, too, where anything is admitted by the executor or administrator to be a mistake, all this may be corrected. But if the mistake or error is only to be shown by going anew into the proof, this should be held as *res adjudicata*, and not liable to be opened to new testimony.

Adopting these rules, then, let us see what can be investigated in a new trial of this motion. There was an account filed by one of the executors in February, 1864, but no notice seems to have been given as to the settlement of this account, and no action seems to have been taken thereon. In February, 1865, a second account was filed, not embracing what was contained in the first, but merely setting out with the balance as shown by that account, and continuing the account from that time down to the filing of this second account. Upon the filing of this account, notice was given that the court would hear exceptions to the same, and take such steps as the law requires for the settlement thereof. This case seems to have been regularly brought to a hearing, and the account was examined. But in approving this account, we hold the first account was in no manner approved or acted on. Had the first account been properly approved, then it would have been proper to commence where that left off. But as the first account was never approved, the mere assertion in the second account of what appeared as the balance due on the first cannot be held to preclude an examination into the items of the first.

The first account has never been the subject of adjudication. That the court and the counsel who drew up the decree of settlement considered only the latter account as adjudicated, is apparent from the language of the decree. That decree concludes as follows: "And it appearing to the court, after due examination, that said account contains a just and full statement of all the moneys received and disbursed by said executor from the twelfth day of February, A. D. 1864, the date of the preceding report of said executor, to the twelfth day of February, A. D. 1865, including all sums of money belonging to said estate which came to his hands as such executor, or were received by another by his order or authority for his use as such executor during said period; that the amount of said money thus received was \$6,483.83½, and the amount thus disbursed \$11,825.06, leaving said estate debtor to said executor in the sum of \$5,341.22½; that for the items of disbursements proper vouchers are produced to the court; and it being proved by the affidavit of said executor, annexed to his account, that the items of his expenditure named and charged in said account have actually been paid and disbursed by him at the place where, the date when, and the parties to whom the said payments are stated in the said account to have been made respectively. And the court having duly considered the said report and account, and the proofs and allegations and matters aforesaid, the court finds that the said account is just, true, and correct, and entitled to be allowed and approved. And now, on motion of G. D. Keeney, Esq., attorney for said executor, it is ordered and decided that the said account and report of Marco Medin, executor as aforesaid, be and the same are hereby in all respects, as the same were rendered for settlement by the said Marco Medin, executor, etc., approved, allowed, and settled."

If, then, only the second account was properly adjudicated, all that was embraced in the first account is open to inquiry. The court may inquire into the funeral expenses, both as to what was expended and as to the reasonableness of the expenditures. It may inquire into the circumstances of the sale of the Uncle Sam stock, as to whether it was a fair and *bona fide* sale. The same taxes are admitted to be included in both bills; they must of course be excluded from the first. Inquiry may be made into the matter of rents from the death of testator to February 12, 1864, the value of liquors on hand,

the fairness of the sale, etc. Indeed, the whole question is open, so far as the period from the death of testator to February 12, 1864, is concerned; and the executor should be compelled to make a full showing as to this part of the affairs of the estate, both as regards the property which came to his hands and as to the repairs he made. His vouchers for expenditures in repairs should be produced, or if lost, accounted for.

Inquiries may also be made as to whether these expenditures were reasonable and proper. Of course the executor must account for jewelry, etc., omitted from the invoice.

With regard to the compromise affair, we are more at a loss than in regard to any question presented in the record. Here is an item of the account of February, 1865. If anything was adjudicated in regard to this item, it was, first, determined that this amount was paid; second, it must also have been determined that it was rightfully paid; for these are the very questions presented as to each item of an account presented for settlement. Whether it was paid, was a question to be determined by proof. Whether it was rightfully paid, was a mixed question of law and fact. If the executor, on his own motion, could pay this amount of money and hold the estate responsible, then we must in this case presume that it was proved to the satisfaction of the court that this was rightfully paid. But we incline to the opinion that an executor, without the order of the court, could not lawfully make such payments. A suit pending against the estate at the time, we are inclined to think, under the provisions of section 203 of the probate act, might, upon the order of the probate court approving such a course, have been compromised, and the money paid to effect a settlement. But the executor, without the advice of the court, had no right to make such a compromise.

He did, however, make the compromise; and as he was both executor and tenant in common, he must be considered as having made it in his capacity of tenant in common.

The law is well settled that when one tenant in common buys in an outstanding title, it inures to the benefit of all his co-tenants, if they elect to bear their share of the burdens of the purchase: Kent's Com., 10th ed., 311, note c. But the co-tenants cannot, we think (unless they have previously assented to or encouraged the purchase), be compelled to contribute. It appears to be purely a matter of choice with them whether they will contribute and take the benefits of the purchase, or

stand on their former rights. We have not met with any reported case where a co-tenant has been forced to contribute, where he fairly and openly chose to renounce the benefits of the purchase.

The devisees in this case are, then, entitled either to contribute or reject the terms of this compromise. We think that right had not been and cannot be properly presented to them in the probate court. This is a matter to be settled between the parties amicably, or in a court of equity. The probate court has nothing to do with it.

The executor clearly had no right to borrow money for the estate unless expressly authorized by the will, and the charge for interest in his second account must be struck out unless so authorized. An executor has no right to speculate for or with the estate. If he held mining stock which was likely to be forfeited before he could apply to the court for instructions, he might be justified in paying something to preserve it. But he is certainly not justified in borrowing money for mining speculations.

If he held stock liable to large assessments, he should have applied to the court for leave to do one of two things: either to sell the stock, or, better still, if the estate was surely solvent without the stock, to turn it over to the legatees, and let them sell, or take their chances on speculation with it.

The order of the court below must be reversed and set aside.

The petitioners will be allowed to amend their petition if they so desire, and further proceedings will be had in accordance with the views expressed in this opinion.

RESPONSE TO PETITION FOR REHEARING.

By Court, BEATTY, C. J. In this case a petition for a rehearing has been filed, indicating that the original opinion herein has, to some extent, been misunderstood. Had counsel read the opinion a little more carefully, it appears to us at least a portion of the matter contained in the petition might have been omitted.

However that may be, we will endeavor to make ourselves fully understood on some of the points referred to.

We did not hold, as counsel say, "that section 239 of the probate act makes the settlement of an executor's or administrator's account final, and not open to further question, except by bill in chancery charging fraud." At least we did not hold it in the unqualified terms used by counsel. We dis-

tinctly held that the court, notwithstanding section 239, might, at any time before final settlement, correct its own errors, whether of law or fact. That any error apparent on the record might be corrected before final decree, but the court could not open the proof as to the matters of account already passed on and settled by interlocutory decree.

It is the failure to notice this distinction which seems to have misled counsel in various particulars.

Counsel complain that this court assumes that there never was but one settlement of the executor's accounts upon notice, whilst in fact there were two such settlements; that they were injured by this assumption of the court; that no such point was ever made by the opposing counsel, and if it had been, they could have shown that it was unfounded; that if the record fails to show both settlements, it was not the fault of respondents, it having been made up solely under the direction of appellants.

The plaintiffs (appellants) attack certain payments and expenditures of respondents. The respondents say these expenditures cannot be inquired into, because they have already been passed on by the probate court. To show that they have been passed on by that court, respondents refer to a decree which clearly shows that part of these items have been passed upon, but fails to show any adjudication as to other portions of the account. This decree is contained in the record before this court.

We certainly could not know that respondents had introduced evidence in the court below which was not contained in the statement of the case, or that their answer contained matter not copied in the record. If the transcript failed to contain any portion of the evidence or pleadings material for the defense, it was the business of respondent's counsel to have the record amended.

Reference is made in the petition to various expressions in the transcript which counsel seem to think indicate that there were two decrees actually made in the probate court in regard to these accounts. We think no one not otherwise acquainted with the fact would ever have drawn such inference from the record. All the expressions quoted are entirely reconcilable with the existence of but the single decree found in the record, except one word. The word "decrees" is used in one place where it should have been in the singular (decree), if there was only one settlement. But when that word appears in the

record, it seems to be shown by what immediately follows that the "s" was a mere clerical error.

The transcript is so badly made up that we are at a loss sometimes to understand how certain matters got into it. The body of the answer, as contained in the transcript, makes no reference to any exhibits. But immediately after the affidavit to the truth of the matter contained in the answer follow the two accounts, and then this sentence: "That upon the filing of the accounts such proceedings were thereafter had, that the court rendered and entered the following decrees." After this follows the decree settling the last account only. Then comes a statement of the evidence. On the margin of these accounts is marked, "Answer continued." We infer, then, that these accounts and this decree must have been attached to the answer as exhibits. But because the clerk uses the plural "decrees," we could not well infer that there was another decree attached as an exhibit to the answer which he did not copy. Especially could we not so infer when the answer wholly fails to aver the existence of any such decree.

But whilst the record utterly fails to show in any manner that there was more than one decree in regard to the settlement of accounts in this estate, we will so far modify our former opinion as to direct the court below to give to the first account, if it should appear to have been properly settled upon notice and a regular decree of settlement made thereon, the same effect that we have given to the second account, which was settled in March, 1865.

Whatever upon the face of the account and decrees seems to have been once adjudicated must be considered closed, except in so far as the record itself may show some error in the former decree. If it should appear that this first account was regularly passed on and settled, it will of course much abridge the extent of inquiry in any subsequent trial. We cannot, in the absence of what is claimed to be a regular decree, determine its character or sufficiency. To prevent misunderstanding, we will say the first item of the first account is for \$1,480 cash on hand. The passage of this account would not prevent the appellants from showing there was cash on hand at death of testator other than or beyond the \$1,480.

The next item is \$3,573.75, rents. The passage of this account with this item does not preclude the appellants from

showing that the executors may have received other rent or rents to a greater amount than \$3,573.75. These are mere admissions of a general result, and do not purport to be items of account presented in proper form for adjudication of the court.

With regard to the third item, \$1,295.47, received from the settlement of partnership business, it is evident this also is the mere result of other accounts. It is not an account in such form as could properly be presented for settlement. The court may properly go into an investigation of the accounts which produced this result, unless there was a former settlement with the probate court, and this is the balance found on that settlement. In the absence of such settlement, the court may go back to the start, ascertain what amount of partnership property came into the hand of the executors, how they disposed of it, and what were the legitimate expenses to be deducted.

In regard to the items of expenditure for the estate as charged in this account, with the exception of the last item, \$294.12½, they are all of such a character as might legitimately have been paid by the executors. And if it appears that this account was regularly passed on, the law supposes satisfactory proof as to the payment of each item was made, and they are not the subject of investigation in this proceeding. If there was fraud, as insisted by appellants, in the charges for funeral expenses, etc., that must be reached by another proceeding.

As to the last item in this account, charged against the estate as money advanced, without any specification as to when, where, or for what advanced, we think it was error to allow it on such a vague statement. The executor should still be required to show for what this was paid, and allowed such portion of it as he can show was properly expended.

In the beginning of the second account is a repetition of certain charges against the estate, to the amount of \$751, which were contained in the first account. We think the accounts themselves clearly show this error, and it is admitted by the executors. This can be corrected in the next settlement.

The intention of this court in requiring the executors to file new accounts making a full showing of all the property and assets that have come to their hands, etc., was to have them file a statement, first, of the amount and value of the

jewelry, watch, etc., which it is admitted came to the hands of the executors, or one of them, and was never placed in any inventory or account of the estate. Another was, to make them show the amount of partnership property which belonged to decedent, and the particulars as to the manner of disposing thereof, and the expenses of closing the partnership affairs, instead of merely returning the general result as netting \$1,295.47. So, too, instead of the general return of \$3,573.75 for rents for the first term of — months, the petitioners are entitled to an account of the items making up that general result.

It was not the intention of this court to require that which had once been properly passed on to be re-opened. With regard to the amount paid for the purchase of an adverse claim to the real estate held as tenants in common by Medin and Milinovich, the deceased, we will repeat: as the executor chose to compromise this suit and buy in the outstanding title without asking leave of the probate court (which was the only legal course he could have taken), he must be deemed to have acted in that purchase, not as executor, but as a tenant in common. Having then purchased in the estate as a tenant in common, his purchase inures to the benefit of all his co-tenants unless they, upon a proper offer made to them, refuse to sanction the purchase and contribute their share of the purchase or compromise money. We have already said this is a matter which cannot be settled in a probate court. The parties must either settle this matter between themselves, or resort to the equity side of the court to settle the difficulty.

It is claimed that petitioners have ratified this purchase by accepting the rents, etc. We can see no evidence of ratification in this. Respondents came into possession of one third of the estate as representatives of the deceased. They can no more deny the title of deceased than a tenant can deny the title of his landlord. Upon the mere *ipse dixit* of the executors or their counsel that the adverse title bought in is a better one than that under which they formerly held, the executors cannot retain the share of rents belonging to the deceased. But we do not understand that petitioners wish to renounce the benefit of the purchase. They seem willing to pay their portion of the purchase-money. The dispute is as to what was legitimately paid. The amount paid to the real holders of the adverse title is not questioned. Petitioners only question the propriety of large payments made, as they

claim, unnecessarily, if made at all, to parties who neither had nor claimed to have any title to the property. The probate court can neither investigate the facts as to whether these outside payments were or were not made, and if made, whether made rightfully or without necessity and wrongfully. If the parties cannot settle this matter between themselves, it must be settled in another court. In the mean time the rents must be accounted for by the executors.

The court ordered the interest items to be struck out, because it is unlawful for an executor (unless authorized by will) to borrow money for an estate. No state of proof could have justified the allowance of these items, therefore they were improperly allowed; and that is one of that class of errors which the court may correct before final decree.

Counsel complain that whilst the court fails to find fraud against the executor, it still uses many expressions calculated to place him before the community in a very unfavorable light. The court in its opinion did intend to refrain from any expression of opinion as to the charge of fraud, but at the same time intended to express in language not to be misunderstood its disapproval of the reckless and wasteful manner in which this estate was managed, the utter disregard of law shown in every step of the management from the death of the deceased to the commencement of this proceeding. It is the intention of this court, so far as in its power, to put a stop to the waste and destruction of the estates of deceased persons; and we shall not hesitate to express our views of the law because it may injure the feelings of some executor or administrator who thinks that he is only following the common custom of the country, and therefore perfectly justifiable in squandering the estate that may come to his hands.

We again repeat what we said in our former opinion, that extravagance, waste, and mismanagement of an estate afford the same ground for removal of an executor as absolute fraud.

A rehearing is denied, but the judgment is so modified as to direct the court below to conform in its future proceedings to the views as expressed in the former opinion, and as modified in this response to the petition for a rehearing.

POWER OF ADMINISTRATOR TO MAKE ESTATE OF DECEDENT LIABLE FOR ATTORNEY'S FEES. — An executor or administrator who, in the care and management of an estate whose administration is committed to him, finds it necessary to employ and pay counsel to render services or to advise him in the proper discharge of his duties, is entitled to be allowed and repaid out of

the estate of his testator or intestate: 3 Williams on Executors, Am. ed. by Perkins, 1860; Dayton on Surrogates, 498; *McNamara v. Jones*, Dick. 587; *Green v. Fagan*, 15 Ala. 335; *Hearrin v. Savage*, 16 Id. 286; *Pickens v. Pickens*, 35 Id. 452; *Smith v. Kennard*, 38 Id. 695; *Smyley v. Reese*, 53 Id. 89; *Reynolds v. Canal & B. Co.*, 30 Ark. 520; *Davis v. Rawlins*, 2 Harr. (Del.) 125; *Eppinger v. Canepa*, 20 Fla. 262; *Wood v. Goff's Curator*, 7 Bush, 59; *Forward v. Forward*, 6 Allen, 494; *Noel v. Harvey*, 29 Miss. 72; *Tell City F. Co. v. Stiles*, 30 Id. 849; *Wendell v. French*, 19 N. H. 205; *Tuttle v. Robinson*, 33 Id. 104; *Wolfe's Case*, 34 N. J. Eq. 223; *Kingsland v. Scudder*, 36 Id. 284; *Polhemus v. Middleton*, 37 Id. 240; *Osborne v. McAlpine*, 4 Redf. 1; *Campbell v. Mackie*, 1 Dem. 185; *Gilman v. Gilman*, 6 Thomp. & C. 211; S. C., 4 Hun, 69; *Sterrett's Appeal*, 2 Penr. & W. 419; *Pusey v. Clemson*, 9 Serg. & R. 204; *Ammon's Appeal*, 31 Pa. St. 311; *Lindsay v. Howerton*, 2 Hen. & M. 9. Chapman, J., in delivering the opinion of the court in *Forward v. Forward*, 6 Allen, 497, said: "The general rule is, that executors who are obliged to employ counsel in the settlement of their accounts shall be allowed to charge to the estate the reasonable fees of counsel." And the ordinary, in the case of *Kingsland v. Scudder*, 36 N. J. Eq. 287, said: "A fiduciary charged with the management of property, whether as executor or otherwise, has a right to employ counsel when necessary or proper to protect the estate, or to enable him properly to manage it, and the reasonable charges for such services will be paid out of the estate. But he will not be allowed for such work, though done by counsel, as he, in contemplation of law, is bound to do himself." Counsel fees are not included in the commissions allowed by law to administrators, but are an additional compensation: *Hawkins v. Cunningham*, 67 Mo. 415; *Estate of Handfield*, 16 Mo. App. 332. And the reasonable fees of an attorney retained by a former personal representative to protect the interests of the estate are, when paid by an administrator *de bonis non*, proper allowances in his favor: *Hearrin v. Savage*, 16 Ala. 286. The personal representative cannot, however, make the estate of the deceased liable for the performance by an attorney employed by him of what such representative is bound to do himself. If an executor or administrator sees fit to devolve all the labor and responsibility of the administration upon an attorney, he must pay him out of his own commissions for that portion of the services which he ought himself to have performed: *Estate of Ballentine*, Myrick's Prob. Rep. 86; *Succession of McCarty*, 3 La. Ann. 517; *Raymond v. Dayton*, 4 Dem. 33; *Edmonds v. Crenshaw*, Harp. Eq. 224. Nor can an executor or administrator make the estate liable for attorney's fees paid by him in litigation carried on for his own personal benefit. Such services are not a proper charge against the estate: *Estate of Chinmark*, Myrick's Prob. Rep. 128; *Estate of Stott*, Id. 168; *Wood v. Goff's Curator*, 7 Bush. 59; *Brinton's Estate*, 10 Pa. St. 408; *Stephens's Appeal*, 56 Id. 409; *Sherman v. Angel*, 2 Hill Ch. 26; *Villard v. Robert*, 1 Strob. Eq. 393. Where litigation becomes necessary during the administration of an estate, the personal representative is entitled to reasonable attorney's fees necessarily expended by him in conducting it: *Williamson v. Mason*, 23 Ala. 488; *Satterwhite v. Littlefield*, 13 Smedes & M. 302; *Noel v. Harvey*, 29 Miss. 72; *Dey v. Codman*, 39 N. J. Eq. 258; *St. John v. McKee*, 2 Dem. 236; *Willson v. Willson*, 2 Id. 462; *Wilson's Appeal*, 41 Pa. St. 94; *Bryson v. Nickols*, 2 Hill Ch. 113; *Trammel v. Philleo*, 33 Tex. 395. But he will not be allowed for counsel fees, where he engages in useless, unnecessary, or vexatious litigation, particularly if such litigation is against those who are rightfully entitled to the funds which he withholds: *Bendall v. Bendall*, 24 Ala. 295; S. C., 60 Am. Dec. 469; *Anderson v. Anderson*, 37 Ala. 683; *Mims v. Mims*, 39 Id. 716;

Lilly v. Griffin, 71 Ga. 535; *Davis v. McNeil*, 1 Ired. Eq. 344; *Withers's Appeal*, 13 Pa. St. 582; *Wham v. Love*, Rice Eq. 51. He cannot be allowed credit for counsel fees paid by him, where such counsel was unnecessary from the fact that a sufficient number of counsel were previously engaged: *Crowder v. Shackelford*, 35 Miss. 321. An executor cannot litigate the claims of one legatee against another at the expense of the estate: *Estate of Marrey*, 65 Cal. 287. But where a litigation is equally the fault of both parties, one half may be paid out of the estate and the other half must be paid by the executor or administrator: *Smith v. Kennard*, 38 Ala. 695. But an administrator will not be allowed credit for an attorney's fee in a case where the litigation is entirely his own fault: *Pearson v. Darrington*, 32 Id. 227; *Morrow v. Allison*, 39 Id. 70; *Teague v. Corbitt*, 57 Id. 529. Where litigation results beneficially to the estate, the counsel fees are a proper charge against the estate: *Matter of Meeker*, 9 Daly, 556; *Atcheson v. Robertson*, 4 Rich. Eq. 39; *Wham v. Love*, Rice Eq. 51. An executor should not be allowed credit for sums paid for attorney's fees, unless he shows that the services were rendered for the benefit of the estate: *Brandon v. Hoggatt*, 32 Miss. 335; *Royer's Appeal*, 13 Pa. St. 569. An executor is not authorized to pay an attorney ten dollars to attend to a suit in the justice's court, when the sum involved is less than that sum, and there are no special circumstances attending the case: *Holman v. Sims*, 39 Ala. 709. But even where the litigation is unsuccessful, the executor or administrator should be allowed for attorney's fees, provided he acted in good faith in the matter and exercised reasonable prudence: *Holman v. Sims*, *supra*; *Clapp v. Coble*, 1 Dev. & B. Eq. 177; *Holmes v. Holmes*, 28 Vt. 765. If an administrator, under an honest impression that a claim against the estate is not a proper charge against it, employs counsel to resist its payment, he should be allowed the attorney's fee: *Green v. Fagan*, 15 Ala. 335; *Hearrin v. Savage*, 16 Id. 286.

Under the Alabama probate system it seems that executors and administrators are entitled to the advice and aid of counsel in most matters connected with the discharge of their duties, whether the estate be involved in litigation or not: *Smyley v. Reese*, 53 Ala. 89. The courts of New York are not so liberal in the allowance of counsel fees to executors or administrators. In *Pullman v. Willetts*, 4 Dem. 536, it was held that an executor or administrator should not generally be allowed for counsel fees for professional services in preparing the inventory of the personal property of the estate, the statute contemplating that the appraisers would be equal to the duty of preparing it themselves. In *O'Reilly v. Meyer*, 4 Id. 161, it was held that extraordinary compensation should not be allowed to the attorney of an accounting executor, because of the trouble experienced by the attorney in consequence of the executor's ignorance of book-keeping, and his irregular method of keeping his accounts. And it was held that the executor should make good the extra charge out of his commissions. In New York, an administrator employing counsel to assist him in arranging and settling his accounts before the surrogate on final settlement is held to be personally liable to pay such counsel for his services. He has no power to make an agreement with counsel on which the latter can found any claim against the estate of the deceased: *Willcox v. Smith*, 26 Barb. 316; *Mygatt v. Willcox*, 1 Lans. 55. In *Seaman v. Whitehead*, 78 N. Y. 306, it was held that charges for services rendered by an attorney to an executor are against the executor personally; the surrogate cannot decree their payment against the estate, or against the executor as such; the charges are allowed to the executor himself, and he is allowed to charge the estate for such counsel fees as he has been obliged to pay,

limited, however, to the rate prescribed by the statute. An administrator cannot, on settlement with the estate, receive credit for attorney's fees incurred by him and paid to a law firm of which he is himself a member, sharing in the amount so paid: *Taylor v. Wright*, 93 Ind. 121. An executor who prepares his accounts without employing counsel is not entitled to the costs and fees allowed by sections 2561 and 2562 of the New York Code of Civil Procedure, although he is himself an attorney at law: *Estate of Valentine*, 9 Abb. N. C. 313. An administrator *ad litem* who is also an attorney at law, and as such renders services to the estate, is entitled, not to the usual professional charges, but to a reasonable allowance therefor: *Harris v. Martin*, 9 Ala. 895; *Bendall v. Bendall*, 24 Id. 295; S. C., 60 Am. Dec. 469; *Teague v. Corbitt*, 57 Ala. 529; *Clark v. Knox*, 70 Id. 607; S. C., 45 Am. Rep. 93. An administrator has no power to employ counsel to prosecute a person charged with the murder of his intestate, and bind the estate for the payment of the fee: *Lusk v. Anderson's Adm'r*, 1 Met. (Ky.) 426. An executor should be allowed for attorney's fees in bringing an action for the purpose of obtaining a construction of the will, where such action proves to be beneficial to the interests of the estate: *Matter of Meeker*, 9 Daly, 556.

WHETHER ATTORNEY'S FEES FOR CONTESTING OR SUSTAINING WILL ARE CHARGEABLE TO ESTATE. — This is a question upon which there is a diversity of judicial opinion. One line of cases hold that it is the duty of an executor who believes the will under which he is acting to be genuine to support the first probate, and that he is therefore entitled to have allowed to him counsel fees necessarily expended by him in doing so: *Bradford v. Boudinot*, 3 Wash. C. C. 122; *Compton v. Barnes*, 4 Gill, 55; S. C., 45 Am. Dec. 115; *Glass v. Ramsey*, 9 Gill, 456; *Poindexter v. Gibson*, 1 Jones Eq. 44; *Hazard v. Engs*, 14 R. I. 5; *Warden v. Burts*, 2 McCord Ch. 73. And in analogy to the practice of allowing executors the counsel fees expended in the successful defense of a will, an administrator will be allowed like fees out of the estate of his intestate, when his right to a controverted administration is successfully established: *Ex parte Young*, 8 Gill, 285. So if a person named in an instrument as an executor offers it for probate, and it is sustained as a will in the county court, but upon an appeal to the circuit court it is not established, he will be allowed reasonable attorney's fees out of the estate, provided the proceedings were taken in good faith, and upon reasonable grounds: *Bowden v. Higgs*, 9 Lea, 343. And an executor who propounds a will in good faith is entitled to costs out of the estate, whether probate thereof be granted or refused: *Perrine v. Applegate*, 14 N. J. Eq. 531. But where a person named as executor in a will devising real estate, but having only one witness when the statute requires two witnesses, and which, therefore, he ought to know to be invalid, attempts to sustain such instrument by litigation, he cannot be allowed the expenses of such litigation: *Warren v. High*, 1 Murph. 436. Another line of authorities holds that it is no part of the duty of an administrator to contest the probate of a will, and that the fees paid an attorney for services in such contest are not a proper charge against the estate; that an executor is not bound to assume the burden of the defense of a contest of the will by the heirs at law, but may properly throw it upon the legatees or devisees, and that the executor is not entitled, when the will is declared invalid, to charge the estate in his account with the expense of maintaining such defense: *Estate of Parsons*, 65 Cal. 240; *Andrews v. Andrews*, 7 Ohio St. 143; *Mumper's Appeal*, 3 Watts & S. 441; *Royer's Appeal*, 13 Pa. St. 569; *Brown v. Vinyard*, Bailey Eq. 460. In delivering the opinion of the court in *Estate of Parsons*, 65 Cal. 240, Myrick, J., said: "J. W. Parsons was ap-

pointed administrator, and subsequently thereto a document was offered for probate as the will of deceased. Said J. W. Parsons contested the probate of the document, and the court adjudged it not to be the will of said deceased. In and about such contest, said J. W. Parsons employed attorneys (the same who were acting for him as administrator), and for their services in the contest they charged one thousand dollars. This item is not a charge against the estate; it was the affair of the heirs as such to contest, if they wished, the probate of the document,—not of the administrator. The latter is an officer to administer the estate for the benefit of those interested, leaving interested parties to settle their own differences." But in *Scott's Estate*, 9 Watts & S. 98, it was held that an executor is entitled to a credit in his account of administration for fees paid to counsel for their professional services in establishing the validity of the will and of the bequests therein contained, when the legatees entitled to the estate are the parties in interest.

EFFECT AS RES JUDICATA OF ANNUAL SETTLEMENTS OF EXECUTORS AND ADMINISTRATORS: See *Picot v. Biddle's Ex'r*, 86 Am. Dec. 134, note 143, where this subject is discussed at length.

LARGE PORTION OF OLD EQUITY JURISDICTION IS VESTED IN PROBATE COURTS, under the Michigan probate system: *People v. Wayne Circuit Court*, 83 Am. Dec. 754.

EXECUTOR OR ADMINISTRATOR GOING BEYOND STRICT LINE OF HIS DUTY acts on his own responsibility: See *Estate of Knight*, 73 Am. Dec. 531, note 533, where other cases are collected.

POWER OF EXECUTOR TO COMPOUND AND SETTLE DEBT: See *Bailey v. Dikeorth*, 48 Am. Dec. 760, note 762.

HAWTHORNE AND WIFE v. SMITH.

[8 NEVADA, 182.]

LEVY OF ATTACHMENT UPON PROPERTY POSSESSING CHARACTERISTICS OF HOMESTEAD does not give to the attaching creditor such a vested interest in the property as to deprive the claimant of the right to claim it as a homestead. The claimant may select and record it at any time before it is actually levied upon under execution.

ANSWER MAY BE HELD TO AID COMPLAINT which distinctly sets out most of the facts necessary to entitle the plaintiff to the relief sought, but omits some material facts, where the facts so omitted are clearly stated and admitted in the answer.

APPEAL. The opinion states the case.

R. M. Clarke, for the appellants.

George A. Nourse, for the respondent.

By Court, BEATTY, C. J. In the month of March, 1866, appellants moved into a house which, with the land attached thereto, is now the subject of litigation. In September of the same year one Robert Woodburn brought suit against A. W. Hawthorne, and at the time of bringing suit sued out a writ of

attachment, and had it levied on this house and grounds. In December of the same year judgment was rendered in favor of plaintiff, and in the early part of the year 1867 execution was issued, and the property previously levied on under the attachment was advertised for sale. In October, 1866 (after the attachment levied, but before judgment), the appellants filed a declaration of homestead on the property now in dispute. When the sheriff advertised the property for sale, the appellants filed their bill praying an injunction to restrain the sale, and claiming that the property was exempt under the constitution and homestead act. The district judge issued a temporary restraining order, and required the defendant Smith, who is sheriff of Ormsby County, to show cause at a certain day why a perpetual injunction should not be granted. At the hearing of this rule, the judge refused to grant an injunction, and discharged the restraining order. From this ruling in regard to an injunction, the plaintiffs appeal.

It is admitted by respondent that the property claimed is in every respect such as might have been claimed as a homestead if the declaration of intention to so claim it had been filed in time. The question to be determined by us is, whether the levy of an attachment gave the attaching creditor such a vested interest in the property as to deprive the appellants of the right to claim it as a homestead. The thirtieth section of article 4 of the constitution provides:—

“A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated.”

At the first session of the legislature, held after the adoption of the constitution, a homestead act was passed. The first and second sections of that act, which are the only ones throwing any light on this subject, are as follows:—

“The homestead, consisting of a quantity of land, together with the dwelling-house thereon, and its appurtenances, not exceeding in value the sum of five thousand dollars, to be

selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November 13, in the year of our Lord one thousand eight hundred and sixty-one. Said selection shall be made by either the husband and wife, or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state that they, or either of them, are married, or if not married, that he or she is the head of a family; that they, or either of them, as the case may be, are at the time of making such declaration residing with their family, or with the persons under their care and maintenance on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead; which declaration shall be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants."

"Such exemption shall not extend to any mechanic's, laborer's, or vendor's lien, lawfully obtained; but no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid for any purpose whatsoever; provided that a mortgage or alienation to secure the purchase-money, or pay the purchase-money, shall be valid if the signature of the wife be obtained to the same, and acknowledged by her separately and apart from her husband; nor shall said homestead property be deemed to be abandoned without a declaration thereof in writing, signed and acknowledged by both the husband and wife, or other head of a family, and recorded in the same office, and in the same manner as the declaration of claim to the same is required to be recorded; and the acknowledgment of the wife to such declaration of abandonment shall be taken separately and apart from her husband; provided that if the wife be not a resident of this state, her signature and the acknowledgment thereof shall not be necessary to the validity of any mortgage or alienation of said homestead before it becomes the homestead of the debtor."

The first point of discussion which arises in this case is as to what interpretation should be given to the phrase "a home-

stead as provided by law," which is found in the first line of the constitutional provision. The appellants contend that "as provided by law" merely means of such size and value as the law may prescribe; that as there was already a territorial law in existence which exempted a homestead to the value of five thousand dollars, no legislation was necessary to carry the constitutional provision into effect; that no legislature could impose restrictions or terms upon which the exemption from forced sale was to depend; that the existence of a homestead depended on occupancy and use of a house and premises as a permanent residence; that when the existence of a homestead was once established, it became sacred under the constitution, and the legislature could make no law subjecting it to forced sale, however the parties occupying it might fail to comply with any law requiring a selection and recordation thereof; that the only control the legislature has on this subject is to increase or diminish the extent and value of the homestead. On the other hand, the respondent contends that this constitutional provision only requires the legislature to exempt the homestead from forced sale, and in effect authorizes the legislature to make the exemption on such terms and conditions as they choose to impose.

It is difficult to determine which of these interpretations should be adopted. In this case it is perhaps not necessary to determine this question. Even taking the respondent's interpretation, it is evident the constitution intended that at all times the homestead of a family should be exempt from forced sale, except in a few enumerated cases. It is equally evident the legislature intended to carry out this policy of exempting the homestead. If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right, or clearly points out the contingency upon the happening of which the debtor should lose the benefit of the exemption. Here the property was clearly a homestead in fact. If it lacked anything of being such a homestead as the law exempts, it was only the execution and filing for record of a declaration by the husband and wife, or either of them, that they had selected it as such. Upon the filing of such declaration, the statute says it shall be exempt. It is hardly claimed by respondent that the existence of debts, or the actual insolvency of appellants at the time of filing, would have affected their right to select

the homestead and claim the exemption. If, then, the prior insolvency of a party will not prevent his claiming the exemption, we see no reason why an attachment should. The law declares property thus selected shall be exempt from execution. It makes no exceptions. It is no greater hardship to exempt it from an attaching creditor than any other creditor. The object of the attachment law is not to allow the creditor to seize property which is exempt from execution, but to secure that which is liable to such process. As the law is totally silent as to the time when a selection shall be made of the homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that after the selection is made and filed for record, no levy upon or sale of the homestead property can be legally made, except for those classes of debts mentioned in the constitution.

The point that the judge, after granting the restraining order, directs the defendant to show cause why a perpetual injunction should not be granted, instead of making an order to show cause why an injunction should not be granted, is rather technical. Undoubtedly the proper practice is: 1. A restraining order; 2. On hearing defendant at chambers, an injunction; 3. A perpetual injunction on the final hearing. But a mere mistake in the wording of the restraining order is no ground for refusing the proper relief on the hearing.

Respondent contends that the court below was right in refusing the injunction, because the complaint was defective in not stating that the plaintiffs had selected the property in controversy as a homestead, and caused the declaration of their selection to be recorded as required by law. In this respect the complaint is undoubtedly defective; and if that defect had not been cured by the answer, we would have been compelled to hold that the court below was correct in refusing to grant an injunction on so defective a complaint. In this case the plaintiffs state distinctly all the facts necessary to entitle them to the relief sought, except the selection and recordation of the homestead claim. This fact they fail to state. Nor do they state any fact from which the court could infer that the recordation of a claim had been made before levy of execution.

But the defendant states distinctly the date when the plaintiffs filed their declaration of homestead for recordation. The question then is, Does this statement in the answer cure the

defect in the complaint? It is said that a complainant in a bill in equity must make out a case by his own bill, or he is not entitled to relief, although the answer may set out enough facts, when added to those things alleged in the bill, to entitle the complainant to relief.

This may be the correct general rule, but still the rule is not carried out in all its strictness. Both English and American courts have frequently allowed the answer to aid the bill, so as to grant relief that they could not have granted if there had been no answer at all.

In a note to Daniell's Chancery Practice, 411, the editor uses this language: "But when the facts stated in the bill are disproved, or are defectively stated, relief may be granted upon the facts stated in the answer."

For this rule, a reference is made to two Tennessee and two Kentucky cases. The Kentucky cases seem to sustain the text. The Tennessee cases we have not. In the case of *Rogers v. Soutten*, 2 Keen, 598 (15 Eng. Ch.), the court granted relief on a case made by the answer quite different from the one made in the bill. We conclude that courts of equity, under the old practice, would sometimes allow the answer to aid a defective bill. The seventy-first section of our practice act provides as follows: "Sec. 71. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."

It is impossible to suppose the defendant could have been taken by surprise by the court acting on a fact so distinctly stated in the answer. Nor, under the very liberal direction of our statute, do we think that there would have been any impropriety in the court below acting on the facts as they are made to appear by the pleadings, allowing the answer to come in aid of the complaint.

The judgment of the court below must be reversed. That court will grant an injunction pending this action, and take such further steps as the equity of the case may require.

JOHNSON, J., having been counsel in the court below, did not participate in this decision.

A petition for a rehearing was filed, which was answered by the court by Lewis, J. The point principally relied upon by the petitioner's counsel was, that the court erred in holding that the allegations of the defendant's answer

cured the defect in the complaint. The learned judge reviewed the following cases cited by the petitioner: *James v. McKernon*, 6 Johns. 543; *Crockett v. Lee*, 7 Whart. 522; *Jackson v. Ashton*, 11 Pet. 229; but held that not one of them sustained the respondent's position. The rehearing was denied.

ATTACHMENT LEVIED ON HOMESTEAD, EFFECT OF: See note to *Blue v. Blue*, 87 Am. Dec. 279, where this subject is discussed.

THE PRINCIPAL CASE IS CITED in *Lachman v. Walker*, 15 Nev. 425, to the point that, under the Nevada statute, parties claiming the benefit of the homestead law must file a written declaration claiming the premises as a homestead. It is also distinguished in *Child v. Singleton*, 15 Id. 462.

BRYANT v. CARSON RIVER LUMBERING COMPANY.

[3 NEVADA, 813.]

DISTINCT STATEMENT ON APPEAL IS NOT NECESSARY where the record contains a statement used on a motion for a new trial, which purports to contain all the material evidence adduced upon the trial, and an assignment of the errors complained of by the appellant, when the appeal is taken both from the judgment and the order refusing a new trial.

VERDICT WILL NOT BE SET ASIDE MERELY BECAUSE IT IS AGAINST WEIGHT OF EVIDENCE.

MORTGAGE OF PERSONAL PROPERTY PASSES WHOLE LEGAL TITLE TO MORTGAGEE, subject to be revested in the mortgagor upon the performance of the condition of the mortgage. And after breach of condition, the mortgagee has the right, after due notice, to sell the property, either at public or private sale.

PURCHASER FROM MORTGAGEE OF PERSONALTY AFTER DUE NOTICE ACQUIRES INDEFEASIBLE TITLE to the property, and the mortgagor has no right to redeem from such purchaser. The fact that the purchaser knows that his vendor is only a mortgagee does not affect the title acquired by him.

MORTGAGEE OF PERSONAL PROPERTY MAY SELL WITHOUT ACTION, notwithstanding the provisions of section 246 of the Nevada practice act.

MORTGAGE OF PERSONAL PROPERTY WITHOUT DELIVERY is valid as between the parties thereto.

APPEAL. The opinion states the case.

R. M. Clarke, for the appellant.

John Cradlebaugh and W. Patterson, for the respondent.

By Court, LEWIS, J. It is claimed on behalf of respondent in this case that in the absence of a statement on appeal this court cannot extend its inquiries beyond the judgment roll, and as no error is apparent from that, the judgment must be affirmed. The record, however, contains the statement used on the motion for new trial, which purports to contain all the material evidence adduced upon the trial, together with an assignment of the errors complained of by appellant; and

the appeal is taken both from the judgment and the order refusing a new trial. In such cases, it has been the uniform practice of this court to treat the statement on motion for a new trial as a statement on appeal. When such statement contains everything which the appellant wishes to bring to the attention of the appellate court, there would seem to be no necessity for a distinct statement on appeal. The rule which has been observed by this court in this respect is recommended by considerations of convenience, and we see no reason why it should not be followed in this case.

We readily agree with counsel that the verdict and judgment should not be set aside simply because the weight of evidence may be against them, because it is presumed that the jurors, who see the witnesses and the manner in which they testify, are the best judges of the weight to be given to their testimony. Hence, when they have rendered their verdict, it is entitled to great weight and consideration in an appellate tribunal, for as Coke says: "*Verdictum quasi dictum veritatis ut judicium est quasi juris dictum.*"

We will not therefore set aside a verdict when there is no objection to it except that it is against the weight of evidence. This brings us to a consideration of the merits of the case as presented by testimony which, in our judgment, stands uncontradicted.

It is established beyond all questions that Drew, the mortgagee of the lumber, sold the mortgaged property to the defendant, and received a valuable consideration therefor. Drew, in his testimony, says: "I sold to Russell and Crow, and understood at the time that I had the right to sell."

A Mr. Crow, on the part of the defendant, testified: "Bryant told me to buy of Drew; said he was willing for Drew to sell, and for me to buy of him. I then (for the defendant) bought the timber and logs from Drew." The receipt delivered by Drew to the defendant, acknowledging the payment of a portion of the consideration money, also shows a sale, and states the consideration to be thirteen dollars per thousand feet.

A. M. and C. P. Crow both testify that Bryant stated in their presence that Drew was authorized to sell the timber. True, Bryant denies having made any such statement, but there is nothing in the testimony to show that Drew did not sell the property to the defendant, or to support the assumption of counsel for respondent, that Drew simply made an assignment of his mortgage; and the record discloses a fact

rather inconsistent with this theory of the transaction,—that is, the notes secured by the mortgage to Drew were all surrendered to Bryant, the maker, upon the sale to the defendant, both the plaintiff and Drew thereby treating them as paid and canceled. Had it been the intention simply to assign the mortgage, the notes which evidence the debt, it would seem, would have been transferred to the assignee.

Upon the re-examination of Drew he says: "I sold my papers. What I had I transferred. I cannot say whether Bryant did or did not tell me to sell the timber." What he meant to say evidently was, that he simply sold whatever right or title he had in the mortgaged property to the defendant. Giving such interpretation to what he said upon his re-examination, and there is no inconsistency between it and what he stated upon his examination in chief, because, as we shall show, he had the absolute title, and had a right to sell it.

There is nothing, therefore, in the transcript to support the position that Drew simply assigned the mortgage to the defendant, whilst, on the other hand, it is proven beyond all question that the mortgagee sold the property absolutely. As the testimony clearly warrants it, the sale will be treated as an established fact in the case. Then follow the inquiries whether the mortgagee had the authority to sell the property, and if so, what interest the purchaser acquired by such sale. The uniform language of the authorities is, that a mortgage of personal property passes the whole legal title to the mortgagee, subject, however, to be revested in the mortgagor upon the performance of the condition of the mortgage, and possibly by redemption after breach of it: *Brown v. Bement*, 8 Johns. 96; 2 Hilliard on Mortgages, 518; *Ackley v. Finch*, 7 Cow. 290; *Dewey v. Bowman*, 8 Cal. 145; *Tannahill v. Tuttle*, 3 Mich. 104 [61 Am. Dec. 480]. After breach of condition or failure on the part of the mortgagor to perform his contract, the same authorities hold that the title becomes absolute in the mortgagee to the extent that he may upon due notice to the mortgagor sell or otherwise dispose of the mortgaged property to satisfy his debt. If by a fair sale of the entire property only enough be realized to discharge the demand, the mortgagor has no remedy: *Brown v. Bement*, 8 Johns. 96. Indeed, the entire current of authorities supports the proposition that the mortgagee may sell either at public or private sale; and to that extent at least he is treated as the absolute owner of the

mortgaged property. *Charter v. Stevens*, 3 Denio, 33 [45 Am. Dec. 444], relied on by counsel for respondent, does not maintain a different doctrine, nor does it in any wise conflict with the general rule of law as we have stated it. It was simply held in that case that trover might be maintained against the mortgagee for the sale or conversion of a portion of the mortgaged property after the debt had been paid. The court held that what had been done before the sale of the horse, for the conversion of which the action was brought, was equivalent to the payment of the mortgagee's claim, and therefore that he had no further claim upon the mortgaged property.

"The mortgage," said Beardsley, J., "provides that on failure to pay at the time specified the mortgagee might take possession of the said property and sell the same at public auction, after giving six days' notice of the sale, and satisfy said above-mentioned sum of money, and the interest of the same, and costs of selling the same." "Default in payment," says the judge, "had been made, and the mortgagee proceeded to sell under the authority contained in the clause of the mortgage. And before he sold the horse, which alone is now in question, enough money had been raised to satisfy the amount due and unpaid, with interest and expenses. The end and object of the mortgage had been thus fully attained, and the mortgagee had no longer any right to the property which remained unsold, or to sell it under the mortgage." The court, upon these facts, very justly held that the plaintiff could recover in trover the value of the horse converted after the debt had been discharged. But clearly, no such action can be maintained, except where property is sold or converted after the debt is extinguished. But conceding that the case supports the proposition of counsel, still it does not by any means follow that such an action could be supported against the vendee from the mortgagee, which is the case at bar. Counsel will also find upon a careful examination of the case of *Clark v. Rideout*, 39 N. H. 238, that it has no bearing whatever upon this point. The defendant in that case claimed no right as mortgagee of the property, but on the contrary, distinctly repudiated it, and the court treated the case as if no mortgage existed. We find nothing in it to justify the construction placed upon it by counsel. Indeed, the law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the

purchaser from him obtains an absolute legal title as complete, perfect, and indefeasible as can exist or be acquired by purchase; and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court.

For a reasonable time after breach of the condition of the mortgage, and whilst the property remains in the possession of the mortgagee, the courts of equity have uniformly, upon a proper application, allowed a redemption by the mortgagor; but after sale made upon due notice no such right exists, for the purchaser acquires the absolute title. That defendant had notice of the fact that Drew was in possession of the property as mortgagee, is a matter of no consequence whatever; because, as we have shown, Drew as a mortgagee had a right to sell, and notwithstanding the defendant had notice of the mortgage, it acquired an absolute title, if the sale was *bona fide*.

But it is claimed by counsel that section 246 of the practice act prescribes the only means by which the mortgagor's rights may be foreclosed. We think otherwise. That section simply declares that there shall be but one action for the recovery of a debt, or enforcement of a right secured by a mortgage, which shall be for an enforcement of the lien or mortgage, in accordance with the provisions of the statute. It does not, however, deprive the mortgagee of personal property of right to sell without action, and so it has been directly held in California upon a statute identical with ours: *Wilson v. Brannan*, 27 Cal. 268. What might be the effect of a sale made by the mortgagee without notice, and whether notice be necessary or not, are questions which need not be discussed, as there was in this case not only notice but a clear waiver of all informalities in the sale. There is much testimony in the record showing that Bryant had notice of Drew's intention to sell to the defendant, and indeed, that he authorized such sale.

But if it be claimed that previous notice is not clearly proven, Bryant's acquiescence in the sale is irrefragably established. The plaintiff himself admits that he endeavored to obtain a portion of the purchase-money from the defendant, saying that he was to have what remained after Drew was paid. He took back and canceled his notes which were held by Drew, and which were secured by mortgage. And after the sale was made he charged the defendant and obtained his pay for assisting in taking the property in question out of the river, refusing to let the defendant haul it away until he was

so paid. Many such facts appear in the record, which leave no doubt whatever of the full ratification of the sale by the plaintiff. Even conceding the necessity for notice, such ratification amounted to a waiver of all rights which the informality in the sale might have given him. Thus the case is left in precisely the same position as if due notice had been given by the mortgagee before the sale.

That the mortgage in question was void because there was no delivery of property to the mortgagee, is a position utterly untenable. The effect of a failure to transfer the possession of personal property to the mortgagee is simply to make the mortgage void as against third parties. So far as the parties to the instrument are concerned, it is perfectly good without a delivery. None of them can take advantage of that fact for the purpose of defeating the mortgage. The law requiring a delivery of possession of the mortgaged property to the mortgagor was adopted solely for the protection of third parties purchasing or acquiring rights from the person in possession. They alone have the right to take advantage of a failure to comply with this requirement of the law. Surely the mortgagor cannot defeat the mortgage upon any such ground.

We conclude, therefore, that the mortgagee sold the property to the defendant; that he had the right so to sell; and that the defendant acquired an absolute title to the property by means of it.

Judgment reversed, and new trial awarded.

JOHNSON, J., concurring. I concur with Chief Justice Beatty and Mr. Justice Lewis, as to the conclusions they attain in respect to the first point discussed in their opinion. I also concur in the construction they place on section 246 of the practice act, and hold, with them, "that the mortgagee of personal property is not limited to the remedy of judicial foreclosure for the purpose of subjecting the property to a sale for the satisfaction of the debt due." I also concur in the reasoning and in the conclusion respecting the last point discussed in their opinion, concerning the delivery of personal property mortgaged. In relation to the other points (excepting the one hereafter mentioned), as I do not deem them essential in determining this appeal, I express no opinion. I concur in the judgment on the one ground that the statement on motion for a new trial in the lower court establishes beyond a question that the plaintiff, Bryant, ratified the acts of Drew in the

matter of the sale of the mortgaged property to the defendant; and he is thereby concluded from questioning the regularity of the sale, so far as it can be affected by any matter in issue in this case.

MORTGAGE OF CHATTEL PASSES TITLE CONDITIONALLY TO MORTGAGEE: See *Lacey v. Giboney*, 88 Am. Dec. 145, note 148, where other cases are collected.

WHERE EVIDENCE IS CONFLICTING, NEW TRIAL WILL NOT BE GRANTED on the ground that the verdict is against the evidence: *Wilcoxson v. Burton*, 87 Am. Dec. 66, note 74, where other cases are collected.

NO STATEMENT ON APPEAL NEED BE MADE after the entry of the order granting or refusing a new trial, because the statement used on the hearing of the motion for a new trial in the court below will be sufficient in the appellate court: *Walden v. Murdock*, 83 Am. Dec. 135.

CHATTEL MORTGAGE WHEN VALID WITHOUT DELIVERY OF PROPERTY MORTGAGED: See *Golden v. Cockrill*, 81 Am. Dec. 510, note 520, where other cases are collected.

CHOLLAR-POTOSI MINING COMPANY v. KENNEDY.

[8 NEVADA, 361.]

NON-RESIDENCE OF PARTY CLAIMING REAL ESTATE does not affect or qualify the provisions of section 5 of the Nevada statute of limitations. WORDS "ROAD" AND "WAY" ARE NOT SYNONYMOUS. A road is any piece of land used or appropriated for travel, and is a very different thing from a mere right of way.

FIVE YEARS' UNINTERRUPTED ENJOYMENT OF RIGHT OF WAY over public land appropriated for a road establishes a prescriptive right to continue to enjoy the same.

PARTY ASSUMING AND EXERCISING RIGHT OF WAY OPENLY, notoriously, and continuously, without asking the consent of the owner of the land, and without manifesting in any way that he is exercising the right as a favor or license given him by the owner of the soil, must be considered as holding adversely.

PARTY RELYING UPON RIGHT OF WAY BY PRESCRIPTION NEED NOT IN PLEADING AVER that he enjoys the right of way by prescription. It is sufficient for him to aver that he has enjoyed the right of way for a period long enough to have established his right.

APPEAL. The opinion states the case.

C. J. Hillyer, for the appellant.

Mesick and Seely, for the respondents.

By Court, BEATTY, C. J. In the year 1860 certain parties took steps to appropriate and take up for private use a portion of public land in or near Virginia City.

Subsequently, in April and May of 1861, the Potosi Com-

pany, a mining association, laid out and built a road through the same land. Since then the Potosi Company has been consolidated with the Chollar Company, and the two are now incorporated as the Chollar-Potosi Company.

The Potosi Company and the Chollar-Potosi Company have continued since May, 1861, to use and enjoy that road, and have suffered all persons having business or pleasure leading them to the Potosi works to use the same freely, as if it were a public road. In May, 1867, the defendants built a fence across the Potosi road, thereby obstructing travel on the same. The plaintiff, which has succeeded to the Potosi Company's rights, then filed its bill to enjoin the defendants from obstructing this road.

The defendants, in answer to this bill filed, set up the fact of the location in 1860, and claim that as the successors in interest of those who located this tract of land they have exclusive right of possession, and consequently the right to obstruct the road.

Whether the defendants are entitled to the possession of the land they or their predecessors attempted to appropriate in 1860, it is unnecessary to inquire under our view of the case. The plaintiff claims an absolute right to the road, asserts continuous and uninterrupted possession of the same for more than five years previous to the obstruction of the road by defendants, and relies on the statute of limitations as securing its rights. The plaintiff also claims a right of way by prescription.

The defendants (respondents in this court) claim that the appellant is not entitled to protection under the statute of limitations, for two reasons: First, because the appellant (plaintiff in the court below) is a foreign corporation, and is therefore not protected by the statute; second, because the road is not land, but a mere incorporeal hereditament, and therefore is not included within the terms of our statute in regard to entries on land; lastly, it is contended by respondents that the appellant cannot claim any rights by prescription, because none such have been pleaded.

We will examine these three propositions *seriatim*. And first as to the point, how is this question of limitations affected by the fact of plaintiff's being a foreign corporation, or a corporation created in a neighboring state?

The fifth section of our statute of limitations reads as follows: —

"No cause of action or defense to an action founded upon the title to real property, or to rents or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense is made."

Then follow several sections in regard to the effect of forcible entry, defining what shall be adverse possession, etc.

Sections 14 and 15 read as follows:—

"Sec. 14. If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services, out of the same be, at the time such title shall first descend or accrue, either,—1. Within the age of twenty-one years; or 2. Insane; or 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than life; or 4. A married woman.

"Sec. 15. The time during which such disability shall continue shall not be deemed any portion of the time in this act limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced or entry or defense made within the period of five years after such disability; but such action shall not be commenced or entry or defense made after that period."

Section 16 et seq. to section 21 prescribe limitations for personal actions. Sections 21 and 22 read as follows:—

"Sec. 21. If, when the cause of action shall accrue against a person he is out of the territory, the action may be commenced within the term herein limited after his return to the territory; and if, after the cause of action shall have accrued he depart the territory, the time of his absence shall not be part of the time limited for the commencement of the action.

"Sec. 22. If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either,—1. Within the age of twenty-one years; or 2. Insane; or 3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or 4. A married

woman,—the time of such disability shall not be a part of the time limited for the commencement of the action.”

Respondent contends that a foreign corporation being in contemplation of law always absent from the state, the twenty-first section prevents the statute from ever running in its favor. Several cases are referred to on this point, some of which do clearly hold that in personal actions under a statute similar to ours, it never runs in favor of a foreign corporation. There is also one case cited from the 10th Indiana Reports, where the action was for the recovery of land, where the court had held that the absence of the defendant would excuse the bringing of an action within the time limited by statute. This latter case we will notice presently. With regard to the question which seems to be mooted, whether in a personal action the fact that the defendants being a foreign corporation is to have the same effect in suspending the running of the statute as the absence from the state of a natural person, we do not think need be determined in this case.

The twenty-first section, we are satisfied, in no manner qualifies the provisions of the fifth section. It simply provides that where a cause of action accrues against a person out of the territory (now state), or such person departs from the territory, the statute shall not run during the absence of the defendant.

But section 5 imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past. The limitation being here in respect to the possession of the land, we do not see how the provisions of section 21 could qualify this section 5, unless the land should have absented itself from the state. This, we believe, is not claimed.

But it is said by respondent that whatever may be the language of section 5, the spirit and intent is to impose a limitation of five years to the bringing of real actions, and this section 21 must, if liberally and beneficially interpreted, excuse a party from bringing his action, as well for realty as for personal property or damages, where the person in adverse interest is absent from the state when a cause of action arises.

An examination of the whole act will, we think, clearly show that such was not the intention of the legislature. And we think the distinction in the two classes of cases was eminently wise and proper. Section 5 prescribes the limitation

to real actions in general terms. Sections 14 and 15 make the exceptions to the operation of the general rule, and we think it was evident that these are intended to constitute the only exceptions to the general rule. If it had been intended to make other exceptions to the running of the statute in real actions, they would most likely have been either incorporated in sections 14 and 15, or added in a separate section in immediate connection with them. But after section 15 comes the limitation in personal actions in section 16; and then in sections 21 and 22 come the exceptions to the limitations imposed in section 16. Neither the language nor the context seem to connect sections 21 or 22 with section 5. Indeed, section 22 is expressly limited to actions other than for real property, and section 21 is not by its terms applicable to the limitations imposed in section 5. Here was a party who had been five years in the uninterrupted possession of a piece of land, using it as a road. This showed a *prima facie* right to continue to use such land as a road. Respondents enter upon and build a fence across it. They are sued, and in answer to the *prima facie* case made out by the plaintiff, say: "We had a right to enter, because we took up and appropriated this land through which the road runs some seven years since." But they fail to show that they had been in possession of this land within five years. This defense, then, wants one element of being a good one, for the law says: "No . . . defense to an action founded upon the title to real property . . . shall be effectual unless it appear that the person . . . making the defense . . . was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such . . . defense made."

Respondent, however, insists that this view of the case is in direct conflict with the decision of the supreme court of the state of Indiana, in the case of *Lagow v. Neilson*. Without expressing any opinion as to the correctness of the decision of the Indiana court, we think it can be safely affirmed that it can afford but little aid in interpreting our statute. In that case, the defendant Neilson, for his third plea, says: "That the cause of action did not accrue to the plaintiff within twenty years next before this action was brought." The court, in speaking of the third plea, or "third paragraph of the answer," as they call it, use this language: —

"The reply to the third paragraph of the answer is as follows: 'Plaintiffs say that for twenty years next before the

commencement of this action, Neilson, the defendant, was a non-resident of this state.' To this reply, the court sustained a demurrer. And the question to settle is, Does the reply avoid the defense of the statute of limitations?

"Section 216 of that statute declares that the time during which the defendant is a non-resident of the state, or absent on public business, shall not be computed in any of the periods of limitation. But when the cause has been fully barred by the laws of the place where the defendant has resided, such bar shall be the same defense here as though it had arisen within this state': 2 R. S. 77.

"It is insisted that this section was intended to apply to personal actions, and not to those instituted for the recovery of real property. We are not inclined to adopt that construction. As contended, the concluding branch of the section should not be so construed as to allow the law of limitation of a sister state to be used here in regard to actions for the realty; and it may be that for the recovery of real estate a party is never prevented from bringing his suit by the non-residency of any claimant or owner; still, these conclusions, not being inconsistent with the very explicit language used in the first branch of the enactment, cannot be allowed to control it. The phrase 'shall not be computed in any of the periods of limitation' evidently refers to all the periods of limitation definitely fixed by the statute; hence there seems to be no room left for construction. The demurrer was not well taken."

The difference between the language of section 216 of the Indiana statute and section 21 of our act is striking. "Any of the periods of limitation" is a much more comprehensive phrase than "when the cause of action shall accrue against a person." The first would readily include a period of time after the lapse of which an entry on land would be illegal. The latter does not by its terms refer to any such period. Besides, the terms of the Indiana statute (which is not accessible to us) in regard to the limitation of real actions may be entirely different from ours. The Indiana court seems to have arrived at the conclusion it adopted only because of the explicit language of their statute. Ours is so very different that the case referred to afforded us but little aid in construing it. We are satisfied that the non-residence of a party claiming real estate does not affect or qualify the provisions of section 5 of our act. If land is vacant, the owner can take

peaceable possession without suit. If occupied, he can bring suit against the occupant; and it is not necessary to inquire what the *status* of the occupier is. If the land is occupied by a mere servant, as between him and his employer the possession is in the master, and not the servant. But if a third party owns the land, both are trespassers as against him; and a suit against the servant is just as effectual as against the master.

It is, however, contended by respondents that the record does not show that the appellant had or claimed to have any land, but merely a right of way over land. The language of the complaint is as follows: "That it is now, and for more than five years last past it and its predecessors in interest have been, the owners of and in the possession and actual use and enjoyment of a certain road, situate in said county, in the city of Virginia, leading from what is known as the Potosi dump, near the mouth of the Potosi tunnel southward, near the line of E Street in said city, into Gold Hill, and thence westward into C Street; said road being about thirty feet wide, and about half a mile in length, and known as the Potosi road."

The proof shows clearly that the Potosi Company surveyed and graded this road for travel in 1861, and since then have been continuously using it as a road.

Respondents contend that this averment and proof does not show an occupation or possessory right to the land over which the road is built, but merely a claim to a right of way. In support of this view they cite the opinion written by Mr. Justice Shafter, and apparently concurred in by the entire bench of the supreme court of California, in the case of *Wood v. Truckee Turnpike Co.*, 24 Cal. 487. We quote from that opinion the following language: "The plaintiffs acquired nothing by the purchase of the road to which the action of ejectment has any remedial relations. 'Road' is a legal term strictly synonymous with the term 'way,' and in the complaint, and throughout all the title papers of the plaintiffs, their identity is fully recognized. A way is an easement, and consists in the right of passing over another man's ground: Washburn on Easements, 161. It is an incorporeal hereditament, a servitude imposed upon corporeal property, and not a part of it. It gives no right to possess the land upon which it is imposed, but a right merely to the party in whom the way is vested to enjoy the way. Neither is it considered

that the owner of the way is entitled, by reason of such ownership, to a participation in the rents and profits arising from the land upon which the easement is imposed: *Id.* 8. A deed of way, or of a right of way, would pass to the grantee no title to or interest in the land."

The main point here is, that the word "road" is exactly synonymous with "way." This proposition we conceive to be utterly untenable. It is true that the term "way" is sometimes used in the same sense as "road." Sometimes we call a road a street, a lane, etc., a way, — though this is, perhaps, an improper use of the term "way."

But Mr. Washburn, when defining "way" as an easement, uses the word in a strictly legal sense. "Way," in its legal, technical sense, means nearly the same thing as "right of way"; or in other words, the right of one person, of several persons, or of the community at large, to pass over the land of another.

Webster, among other definitions of a road, says it is the "ground appropriated for travel, forming a communication," etc.

Bouvier defines a road as "passage through the country for the use of the people." He also says: "The public have the use of roads. But the owners of the land through which they are made, or which bounds upon the roads, have *prima facie* a fee in such highway." Or in plain English, the public does not usually own the soil over which the roads are constructed, but only a perpetual right to use that soil for some particular purpose.

We cannot find that the word "road" is anywhere used or defined, save in the opinion just quoted, as being synonymous with right of way. In fact, we feel certain it is never so used in common conversation, in ordinary writing, nor in legal works. Road means any piece of land used or appropriated for travel. It may be so appropriated by an individual, a corporation, or the public. Where roads are constructed by turnpike and railroad companies, sometimes they acquire a complete title to the land over which their road is built, and sometimes only the right of way. So the public may, if it chooses, buy the land over which a public way is to be established if the individual owner is willing to sell it, or may, which is more usual, only purchase or procure, by the proper proceedings, the right of way for such road. The road, however, is one thing; the right of way is another and very different.

If an individual wishes to make a road for his own use, and can buy the land over which he wishes to pass for precisely the same money that it would cost to acquire the right of way, undoubtedly he would buy rather than acquire a mere easement. The public lands are open here to be appropriated by any one who desires to do so. The first appropriator has always been considered and held by the courts of this state as the owner of the land as against all the world except the government of the United States. We see no reason why one who appropriates a portion of the public domain for the purposes of a road is not as well entitled to the protection of the courts as one who appropriates a fraction of the same domain for a mill site or corn-field.

If the public were to lay out a road eighty feet in width through the farm of A, and he were to make a conveyance to B, describing the property sold as a road eighty feet in width and one mile in length, passing through the farm of the grantor, we think it would be just as good a conveyance as if he were to describe the property sold as a piece of land eighty feet wide and one mile in length, extending from one side of grantor's farm to the other, and being the same land over which a public road is laid out. The meaning in either case would be equally obvious, and in either case the purchaser would get the fee of the land, subject to the public easement.

The language of the complaint and the proof shows the plaintiff's right to the land (not a mere easement) over which the road runs. Having been for five years in the uninterrupted possession of the same, plaintiff is protected by the statute of limitations, and the acts of the defendant in stopping up the road were tortious, and such as to entitle the plaintiff to the relief sought.

But even admitting that plaintiff did not appropriate the soil, but only claimed the right of way when locating the road, we do not see how that could aid the defendants. An uninterrupted adverse enjoyment of the right of way for more than five years would by prescription establish the plaintiff's right to continue in the enjoyment of the same privileges. Here the plaintiff and those through whom it derives title were in the enjoyment of this road for more than five years without disturbance. It is true that before the expiration of five years there was a claim asserted adverse to their continued enjoyment of this right. The plaintiff or its agent was informed by Mr. De Long that other parties owned or

claimed the land over which their road ran; a proposal was made to sell to plaintiff their right to continue the road, or something of this kind. But a mere proposition of this kind does not amount to a disturbance.

The enjoyment must therefore be considered as continuous and uninterrupted during a period exceeding five years.

The point that the possession or enjoyment is not shown to have been adverse, we think is not well taken. Whenever a party assumes and exercises a right of way openly, notoriously, and continuously, without asking the consent of the owner of the land, and without in any way manifesting by word or deed that he is exercising the right as a favor or license given him by the owner of the soil, it must be considered as exercised adversely to the owner of the land. This appears clearly to have been a case of that sort. At least, such facts are shown as make a *prima facie* case of adverse holding, and nothing is attempted to be shown to the contrary by the defendants. They do not attempt to show that this privilege was exercised in subordination to their rights.

The respondents further contend that if the plaintiff had any rights established by prescription, it has not properly pleaded such prescription, and therefore it cannot avail itself of such right in this court.

Chitty, in his work on pleadings (vol. 1, p. 380), speaking about the particularity with which a plaintiff's case should be stated in his declaration, says: "But it is now fully settled that in a personal action against a wrong-doer for the recovery of damages, and not the land itself, it is sufficient at common law to state in the declaration that the plaintiff, at the time the injury was committed, was possessed of a house or land, etc.; and that by reason of such possession he was entitled to the common of pasture, way, or other right, in the exercise of which he has been disturbed"; and further says (on page 381): "So if the declaration be for diverting a watercourse from the plaintiff's mill, his possession of the mill should be concisely stated, and that by reason thereof he ought to have had the use and benefit of the watercourse, without stating that it was an ancient mill, or disclosing the particular grounds upon which the right to the water is claimed. And in an action for a disturbance of a right of common, or way, or of a seat or pew in a church, the declaration states the possession of a house or land, etc.; and that by

reason thereof the plaintiff was entitled to the right, in the exercise of which he had been disturbed."

We think the complaint here is as specific, and shows the ground of appellant's claim with as much particularity, as Mr. Chitty seems to think is necessary in a common-law declaration. Our system of pleading is extremely liberal, and we are not disposed to hold that parties shall lose their rights merely because they do not plead them with the greatest precision and nicety. The complaint shows the defendant clearly the nature of the plaintiff's claim, and under our system that is sufficient.

The judgment of the court below is reversed, and that court will take further proceedings in the case according to the views herein expressed.

LEWIS, J., concurring. Upon the prescriptive right of way I concur with the reasoning and conclusion of the chief justice.

JOHNSON, J., having been counsel for one of these parties, did not participate in this decision.

ENJOYMENT OF WAY FOR PERIOD OF LIMITATIONS GIVES TITLE: See *Pierce v. Cloud*, 82 Am. Dec. 496, note 498, where other cases are collected.

DALL v. CONFIDENCE SILVER MINING COMPANY.

[8 NEVADA, 531.]

COURT OF EQUITY, IN DECREETING PARTITION, MAY DIRECT ACCOUNTING in a proper case, and require each of the co-tenants to pay his equitable proportion of the expenses incurred in the development or improvement of the joint property.

IN SUIT FOR PARTITION, COURT SHOULD NOT DECREE SALE of the property, except in cases where a division thereof would manifestly be injurious to the interests of the co-tenants.

UNDER NEVADA STATUTE, IF ONE OF CO-TENANTS FILES AFFIDAVIT showing that the sale of an entire mining claim would be injurious to him, the court must divide the claim as prescribed by the statute. A sworn answer setting up the same matter takes the place of such affidavit, and is sufficient.

COMPENSATION CANNOT BE ALLOWED IN PARTITION SUIT for cost of improvements on adjoining property, which incidentally enhance the value of the common property.

APPEAL. The opinion states the case.

Hillyer and Whitman, for the appellant.

Wood and Hillyer, for the respondent.

By Court, LEWIS, J. This is a proceeding under the statute concerning the partition of real property, the plaintiff seeking by his bill a sale of a mining claim consisting of twenty-five feet of ground in Gold Hill, owned by himself and the defendant as tenants in common. After the usual allegations in this character of proceeding, the bill concludes as follows: "And plaintiff further avers that he is desirous that a partition of said premises should be had, and the interest held by plaintiff and defendant be divided between them according to their respective rights; but plaintiff avers that said premises are so situated that a partition thereof cannot be made without great prejudice to the owners, to wit, to plaintiff and defendant, and that for the protection of the rights of the plaintiff and defendant it will be necessary that said premises be sold." The defendant, in its answer, meets this allegation of the complaint in the following manner: "Now comes the defendant, and answering unto plaintiff's complaint, denies that the premises described in said complaint are so situated that a partition thereof cannot be made without great prejudice to the plaintiff and defendant, as by the plaintiff alleged. It further denies that for the protection of their interests, it will be necessary that the said premises be sold, but avers that for all purposes of mining with convenience, twelve and one half feet of ground can be worked with as much facility as twenty-five feet; that the defendant is a corporation for mining purposes, and hath issued its certificates of stock for the number of feet in its claim, including its undivided half of the ground described by plaintiff's complaint; that to sell said ground would create confusion in the affairs of the company, and seriously depreciate its stock, so that it shows to the court that it would be contrary to equity and good conscience to sell said premises."

Then follows an allegation to the effect that the defendant has expended a large sum of money in developing the mine; that by the money so expended the plaintiff's interest in the mine had been enhanced in value; that by the labor of the defendant the mine has been developed; and that plaintiff, though knowing of such labor and expenditure, interposed no objection thereto. Upon these facts an accounting is prayed for, and it is asked that the plaintiff be decreed to pay his

equitable proportion of the expense incurred in such development.

At the trial, the plaintiff's witnesses testified in substance that twelve and one half feet of mining ground in Gold Hill could not be mined to advantage, and it did not afford sufficient room for the erection of the necessary buildings; that twenty-five feet (the extent of the entire claim) could be worked more cheaply and advantageously and securely than twelve and one half feet; that a mine consisting of but twelve and one half feet could only be worked through the adjoining claims, and that one working such mine would be entirely dependent upon the owners of the adjoining mines for the means of taking the ores from it. This is substantially all the evidence introduced by the plaintiff.

The substance of the defendant's evidence on this point is, that twenty-five feet of mining ground could be worked and developed with no more safety or profit than twelve and one half feet. The only object of this testimony was to show that no controlling necessity existed for ordering a sale of the entire mine. Upon this point, therefore, there is a conflict in the testimony presented by the respective parties. The defendant further offered to prove that it had expended a large sum of money in attempting the development of the mine; that such expenditure had been greatly in excess of the receipts; and that the development so made by the defendant had greatly enhanced the value of the mine. This testimony was offered for the purpose of obtaining an accounting, but was ruled out by the court below, and an exception taken by the appellant.

The court found, as facts established in the case, "that the parties to this action, plaintiff and defendant, are seised of and entitled to the mining property and quartz ledge mentioned in the complaint in this action, as tenants in common thereof in fee-simple, each owning an equal undivided one half of the same; . . . that there are no liens nor encumbrances upon the said premises, or any part thereof, either by mortgage, judgment, or otherwise; that the said property is so situated that a partition thereof cannot be made without great prejudice to the plaintiff, one of the owners thereof." Upon these facts a decree was rendered directing the sale of the entire mine in one parcel, at public auction, to the highest bidder.

From this decree, and from the order refusing a new trial, the defendant appeals to this court. Though partition had its origin in the common-law courts, it is a subject over which the

courts of equity assume almost exclusive jurisdiction; and in disposing of the cases for partition, the equities of the respective parties growing out of their ownership of the property as tenants in common or otherwise are taken into consideration, and disposed of upon the broad principles which govern those courts in the administration of justice. As the law deems it against good morals to compel joint owners to hold a thing in common, a decree of partition may always be insisted on as an absolute right. It is not necessarily founded upon any misconduct of the co-tenants or part owners. Hence, in decreeing a partition, the rights and equities of all the parties are respected, and the partition decreed so as to do the least possible injury to the several owners; and "courts of equity," says Mr. Story, "may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality": Story's Eq. Jur., sec. 654.

Again, speaking of cases where one of the parties has laid out large sums of money in improvements on the estate, the author says: "Under such circumstances, the money so laid out does not in strictness constitute a lien on the estate; yet a court of equity will not grant a partition without first directing an accounting, and compelling the party applying for partition to make due compensation. So where one tenant in common has been in the exclusive reception of the rents and profits on a bill for a partition and account, the latter will be decreed": Story's Eq. Jur., sec. 655. And in section 656 of the same work it is said: "For in all cases of partition a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition; but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono* according to its own notions of general justice and equity between the parties." Such are the general and just principles governing courts of equity in the administration of relief in cases of this character in the absence of statutory regulations. When the statute prescribes a course to be pursued, that course must doubtless be followed so far as it goes, but beyond it the general principles which we have stated should control the action of the courts.

In decreeing a sale of the mining ground in this case, the court below seems to have been guided neither by the letter

of the statute nor by those general principles which usually govern the courts in the absence of statute. A sale of the property should never be decreed, except when a partition would result in great prejudice to the respective owners. Such has always been the rule, and section 708 adopting it declares that "in case of partition of a mining claim any of the tenants in common or joint tenants interested therein may file an affidavit showing to the court that a sale for cash would be injurious to him, her, or them; the court shall upon such showing appoint a commissioner, who shall divide such claim as hereinafter provided for." The remaining sections describe the manner in which the commissioner shall proceed, which, if correctly followed, will, we presume, usually result in an equitable partition of the property between the respective owners. When no affidavit is made by any of the part owners, the court might perhaps decree a sale for cash of the entire mine; but when such affidavit is filed, no course can properly be pursued but that prescribed by the statute. The defendant in this case filed a sworn answer, in which it is fully shown to the court that a sale for cash would be prejudicial to its interests. That such an answer fully meets the requirements of the statute, there can scarcely be a doubt. The only object of the law is to require a showing by the party opposing a sale that it would be prejudicial to him. We are not aware that the law attaches any virtue to an affidavit in the ordinary form which it does not to a sworn answer. The fact is presented upon the oath of the party wishing to avail himself of it. Whether it be shown by affidavit in the usual form, or by an answer properly verified, is of no consequence. The court below should therefore have treated the answer as an affidavit, and pursued the course pointed out by those sections of the statute which have been referred to. This court cannot know how the answer was treated by the parties or the court below. It is found in the record before us, and in our judgment it answers all the purposes of an affidavit in the ordinary form.

But it is claimed by counsel that as the statute gives no new right, but only furnishes a new remedy, it is not necessary strictly to follow the mode of procedure prescribed by it.

In answer to this position, it is only necessary to refer to the language of section 708, already alluded to, which, by a fair construction, prohibits a decree for cash when any one of the part owners files an affidavit showing to the court that such a

sale would be injurious to him. When the affidavit is filed, the tenant making it has a right to insist that the partition shall be made as the statute directs. When no objection is made, the court might decree a sale; but as the law regards the rights of all the interested parties alike, if any of them object to such sale, and show in the manner pointed out that it would be prejudicial to them, the statute has marked out a course to be pursued, which will doubtless, in a majority of cases, result in an equitable division of the property; and as the language of the statute is mandatory, declaring that "the court shall upon such showing appoint a commissioner," etc., no other course can properly be pursued. The court, therefore, erred in decreeing a sale of the premises.

The appellant also complains that the court below erred in refusing to allow it to show the amount of money expended by it in developing the mining ground in question, and the value of the improvements placed thereon by it.

We are satisfied from the record as it is presented to us that it is unnecessary to determine the general question as to whether compensation will be allowed for developments made or improvements placed on a mine by one tenant in common; because the record in this case shows that the only developments made or work done by the defendant were upon the adjoining claim, which belongs to the defendant exclusively.

However much the developments on that mine might enhance the value of the premises in question, it was only incidental, and therefore the plaintiff could not be held to be responsible for any money expended in such work or development. Had the work been done upon the twenty-five feet of which a partition is here sought, a different and very difficult question would present itself. Hence, all evidence tending to prove the extent of the developments on the defendant's adjoining claim, or the amount of money expended in making such developments, was properly ruled out.

Unless, therefore, there be developments made or improvements put upon the twenty-five feet in question, the court below will proceed to divide the mine in the manner pointed out by statute.

COURT OF EQUITY MAY DECREE ACCOUNTING IN PARTITION SUIT: See *Martindale v. Alexander*, 89 Am. Dec. 458.

WHEN SALE DECREED IN PARTITION SUIT: See *Baldwin v. Aldrich*, 80 Am. Dec. 695, note 699.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

TUCKER v. KENNISTON.

[47 NEW HAMPSHIRE, 267.]

DEBTOR'S EQUITY OF REDEMPTION, OR ANY OTHER INTEREST IN HOMESTEAD, CANNOT LAWFULLY BE SOLD ON EXECUTION under the New Hampshire statute, if the homestead does not exceed the statutory exemption in value; and if it exceeds that sum, the officer about to levy must, upon due application, set out the homestead before he can make sale of any interest therein, and then can proceed only against the surplus.

EQUITY WILL INTERFERE TO PREVENT CLOUD FROM BEING CAST UPON TITLE upon the same principle that it will remove a cloud from title.

BILL in equity to restrain the defendant, an execution creditor of the plaintiff, from selling the plaintiff's equity of redemption in his homestead, alleged to be less than five hundred dollars in value. The bill was taken *pro confesso*.

John M. Shirley, for the plaintiff.

W. W. Flanders, for the defendant.

By Court, **BELLOWS, J.** The questions raised here are, whether the defendant can lawfully sell the plaintiff's interest in this land; and if not, whether a bill in equity will lie to restrain the defendant by injunction.

In this case, we think the meditated sale by the defendant is clearly illegal and wrongful; and it is equally clear that it would be a cloud upon the plaintiff's title, from which a serious injury might reasonably be apprehended, inasmuch as it could not fail to embarrass him in raising money upon a mortgage of the property in exchanging it for another home-

stead, or making other dispositions of it to suit his interests and the convenience of his family.

It is said in the argument for the defendant that his purpose was to sell only the reversion of the homestead, or the plaintiff's interest subject to that right. It will be observed, however, that the case presented to us shows no such limitation; and if it did, it could not affect the result, because it must be considered as settled by the case of *Fogg v. Fogg*, 40 N. H. 282 [77 Am. Dec. 715], that the homestead is altogether and absolutely exempt from levy or sale upon execution. If it were otherwise, and it could be set off or sold upon execution, subject to the homestead right, it will readily be seen that the debtor's right would practically be limited to the mere occupation of the property as a homestead, and that he could neither exchange it for another, nor mortgage it, because the moment he left it the creditor would come into full possession; and therefore, as the title of a mortgagee would depend wholly upon the contingency that the debtor continued to occupy the property as a homestead, no prudent person would be likely to loan money upon such security. In this way, by depriving a debtor of all use of the homestead, except the mere occupation of it, a creditor might contribute largely to a state of things that would drive his debtor from the homestead into the poor-house, as suggested in the plaintiff's bill, and in that way obtain a complete title to the property.

We are satisfied, however, that nothing of this kind was contemplated in the act, but that the debtor was to be left at full liberty to sell, exchange, or mortgage his homestead, subject only to the claims of the wife and minor children.

The law called the "homestead act" exempts the homestead of the head of each family from attachment and levy or sale, provided it does not exceed five hundred dollars in value; and section 3 provides that the officer about to levy on such lands shall, upon application of the debtor, or his wife, cause a homestead, such as the debtor may select, not exceeding five hundred dollars in value, to be set off to him by appraisers, and return thereof be made; and if no complaint be made by either party, no further proceedings shall be had against the homestead; but the remainder of the debtor's land, if any there be, shall be liable to levy or sale on execution.

Under these provisions, it was held in *Fogg v. Fogg*, 40

N. H. 282 [77 Am. Dec. 715], before cited, that the officer could proceed in respect to the homestead only in the mode pointed out in the statute, and therefore, that the extent of the execution upon the whole land, without first setting out a homestead, after due application, was wholly inoperative and void, even as to the surplus beyond the value of five hundred dollars; and we think it is quite apparent from the terms of that section that no sale of any interest, as a reversion or otherwise, in the land so set off was contemplated.

A "homestead" is to be set off such as the debtor may select, not exceeding five hundred dollars in value; that is, the whole property shall not exceed that sum; not a contingent life interest merely, but the entire estate; and against that there shall be no further proceedings. Indeed, in respect to the debtor himself, he is ordinarily the owner of the entire estate, and not of a mere life interest, and so it must have been understood by the makers of the law; and had they intended to exempt from levy and sale only a contingent life interest, while the debtor must be supposed ordinarily to have a fee-simple, it is difficult to conceive that such terms could have been used.

Section 4 of the same act provides that if the homestead shall consist of a house or house and land, which cannot be divided without injury, it may be appraised, and if it exceed in value five hundred dollars, and the debtor do not in sixty days after notice pay to the sheriff the surplus, he may sell the whole at auction, and pay the five hundred dollars to the husband with the written consent of the wife; but if her consent be not given, then he shall deposit the money in a savings bank to the credit of the husband and wife, where it shall remain for one year exempt from attachment and execution, with a further provision that if no greater sum than five hundred dollars be bid for the homestead, no such sale shall be made, in which case the officer shall return the execution for want of property.

These provisions are also, we think, wholly inconsistent with any authority to sell a reversion of the debtor in the homestead property. It is clear that if the whole estate be sold, the entire sum of five hundred dollars is to be paid to the debtor to dispose of it as he and his wife may choose, or else to be deposited to their credit, and protected from execution for one year. If no more than five hundred dollars can be

obtained for it, no sale is to be made, but the execution returned for want of property.

These provisions tend strongly to show that it was the purpose of the law to exempt absolutely from attachment the real estate used as a family home, to the value of five hundred dollars; and all the terms used are inconsistent with the idea that the word "homestead," as used in that law, was expressive only of a right of occupancy of greater or less duration. On the contrary, we think the term as there used signifies the place where the family dwells, the home farm, or, in common parlance, the homestead farm, and not any particular interest in such home farm.

Thus in section 2 it is provided that such exemption shall extend to any interest which the debtor may own in such homestead, standing on land not owned by him, to an amount not exceeding five hundred dollars. Here, it is clear that the term "homestead" means the home place, and not any particular interest in it; and besides, it exempts expressly any interest which he owns in it, whatever it may be, even if it be a fee-simple.

So in section 3 it is provided that if the lands and tenements about to be levied upon, or any part thereof, shall be the homestead or estate thereof, the officer shall cause a homestead to be set off; evidently using the word "homestead" as signifying the home place.

So in section 4 it is provided that "when the homestead shall consist of a house, or a house and lot of land," which cannot be divided, the whole may be sold under certain conditions.

So in section 5 mortgages of the homestead for the purchase-money obviously means the entire property; and the same terms are found in section 6.

This comports, also, we think, with the general tenor and phraseology of the act, and such is the construction given to the term "homestead" in *Hoit v. Webb*, 36 N. H. 166, where the court say that according to the definition of Lord Coke, of the word "sted" or "stethe," "the homestead means the home place, the place where the home is, and such is its legal acceptation at the present day. It is the home, the house and the adjoining land where the head of the family dwells, the home farm"; and these views are recognized by Bell, C. J., in *Horn v. Tufts*, 39 Id. 483. In *Norris v. Moulton*, 34 Id. 392, the court say that the act creates and sets up in the owner of the estate a

property occupied by him as the head of the family for his family dwelling, a right to hold so much of the estate as may equal in value five hundred dollars, free from levy or sale on execution. In *Gunnison v. Twitchel*, 38 Id. 62, the court say that the authority to mortgage the homestead means the property in which the homestead right may afterwards exist.

We have examined carefully all our decisions under this act, and find nothing which gives any countenance to the idea that the term "homestead" is used in that act to denote merely a conditional right of occupancy, rather than the place or farm itself.

The case of *Judge of Probate v. Simonds*, 46 N. H. 362, applies to a sale of the interest of a deceased person's estate in land, in which the widow had a homestead, and if it be conceded that the court assumed that a sale by the administrator would pass a reversionary interest, it does not, nevertheless, apply to this case, because there the widow had already nothing but a conditional life estate, as held in *Norris v. Moulton*, before cited; and could not be at all affected by a sale of the reversion; whereas, in respect to the husband, the entire estate is vested in him, and as held in *Fogg v. Fogg*, before cited, it was altogether exempt from levy or sale.

In accordance with the views we have stated as to the meaning of the term "homestead," are decisions in Texas and California. In *Philleo v. Smalley*, 23 Tex. 498, 20 U. S. Dig., p. 474, sec. 10, it is laid down that a homestead is a place where a man eats and sleeps, and surrounds himself with the insignia of home. In *Cook v. McChristian*, 4 Cal. 23, it is said that the homestead is the dwelling-place of the family, where they permanently reside. In both cases it is the tenement itself, and not the title or estate in it that is exempt.

It is also worthy of remark that these views best accord with the popular understanding of the term "homestead," and also with other legislation in our state in regard to exemption. Upon these grounds, we are of the opinion that no interest of the debtor in the land occupied as a homestead, not exceeding in value five hundred dollars, can be lawfully sold on execution.

The remaining question is, whether a bill in equity will lie to restrain the defendant from selling the plaintiff's interest in the homestead.

It must now be considered as settled that courts of equity have jurisdiction to remove a title or claim which may oper-

ate as a cloud upon the title of the owner, and from which an injury to him might reasonably be feared, and for that purpose may decree that the deeds or other instruments by which such cloud is created shall be given up and canceled: 2 Story's Eq. Jur., sec. 700, and cases cited; *Hamilton v. Cummings*, 1 Johns. Ch. 516; *Pettit v. Shepherd*, 5 Paige, 493 [28 Am. Dec. 437]; *Sieman v. Austin*, 33 Barb. 9; *Kay v. Scates*, 37 Pa. St. 31 [78 Am. Dec. 399]; *Kimberly v. Fox*, 27 Conn. 307; *Holt v. Bancroft*, 30 Ala. 193; *Shattuck v. Carson*, 2 Cal. 588; *Downing v. Wherrin*, 19 N. H. 9 [49 Am. Dec. 139]; *Hayward v. Dimsdale*, 17 Ves. 111; *Bromley v. Holland*, 7 Id. 22, note a; *Tappan v. Evans*, 11 N. H. 311; *Dodge v. Griswold*, 8 Id. 425; *Sheafe v. Sheafe*, 40 Id. 516.

The application for this species of relief is by a bill *quia timet*, and is addressed to the sound discretion of the chancellor upon the circumstances of the particular case; and the relief will ordinarily be afforded where injury may reasonably be apprehended, and it is made to appear that the retaining of the title or claim is clearly against conscience.

The same principle will authorize the interference of a court of equity to prevent the acquiring of such title or claim, where it at once will become a cloud upon the title of the owner, and injurious to him, and at the same time would be against conscience to hold it; and the cases are numerous where this power has been exerted.

In *Pettit v. Shepherd*, 5 Paige, 493 [28 Am. Dec. 437], it was held that upon the same principle that the court would remove a cloud already existing upon the owner's title, it would interfere to prevent a conveyance that would create such a cloud.

In *Scott v. Onderdonk*, 14 N. Y. 9 [67 Am. Dec. 106], where a municipal corporation sold lands for non-payment of an alleged assessment, which in fact was not made, it was enjoined from making a conveyance which, by statute, would be *prima facie* evidence of all the facts recited, and the certificate of such sale was decreed to be canceled.

So where land was sold on execution against one who held it as trustee for a married woman, and a certificate given to the purchaser by the sheriff, it was held that this was a cloud upon the title, which she might remove by suit in equity before the time of redemption had expired: *Lounsbury v. Purdy*, 18 N. Y. 515.

So in *Shattuck v. Carson*, 2 Cal. 588, the sheriff was about

to sell the plaintiff's homestead illegally, and the court interfered by its decree to prevent the sale, holding that it was the same in principle as removing a cloud already created, and the court cited as in point the cases of *Norton v. Beaver*, 5 Ohio, 179, *Lyon v. Hunt*, 11 Ala. 295 [46 Am. Dec. 216], and *Burt v. Cassety*, 12 Id. 734.

In *Guy v. Hermance*, 5 Cal. 73 [63 Am. Dec. 85], the state commissioners were about to sell lands reclaimed from the sea, and were restrained by a decree of the court, although the legislature had provided that no injunction should be issued against them.

In *Dean v. City of Madison*, 9 Wis. 402, it was held that a tax certificate resting on an illegal tax is a cloud which equity will remove, and restrain the completion of the sale. Much the same are the cases of *Delaplaine v. City of Madison*, 9 Id. 409, and *Knowlton v. Supervisors of Rock County*, 9 Id. 410.

A similar doctrine is held in *Lewen v. Stone*, 3 Ala. 485, and in *Oakley v. Trustees of Williamsburgh*, 6 Paige, 262, where the trustees were about to alter, illegally, the grade of a street; see also *City of Hartford v. Chipman*, 21 Conn. 489, and *New York and New Haven R. R. v. Schuyler*, 17 N. Y. 592; *Dunn v. Tozer*, 10 Cal. 169; 20 U. S. Dig. 475, sec. 52.

Upon a similar principle of preventive justice, courts of equity are in the habit of interfering to restrain the commission of waste, the making of conveyances *pendente lite*, conveyances by trustees to the prejudice of the *cestui que trust*, and conveyances pending a bill for specific performance, the invasion of copyrights, the use of another's trade-mark, the transfer of negotiable paper, and the like; also to compel a principal to pay a debt and thus remove a cloud upon the surety: 2 Story's Eq. Jur., secs. 908, 930, 951, 953, 954, 959, and note, and authorities cited; 1 Madd. 222, 223.

In the exercise of the branch of equity jurisdiction involved in this case, the courts constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which it shall be exerted; at the same time, considering its summary character and the danger of abuse, great caution will be observed in its exercise, lest injustice be done thereby.

In many cases equity would decline to interfere, but leave the parties to their remedies at law. This would ordinarily be the case where a creditor has levied his execution upon land of his debtor which had been previously conveyed by

him, but which the creditor proposed to impeach as fraudulent. If there the creditor acted in good faith, having reason to believe that the previous conveyance was fraudulent and void, he could not be regarded as holding the title thus acquired by the levy against equity and good conscience, and the court would not probably take jurisdiction and undertake to administer this summary remedy, but leave it to be settled at law. If, however, it is apparent that the charge of fraud is merely colorable and groundless, and not in good faith, a court of equity might, in its discretion, interfere and remove a title of that character.

In this case there can be no controversy that a sale under the circumstances disclosed would be wrongful and against equity and good conscience, and therefore, upon the principles suggested, it ought to be restrained by injunction.

In reaching this conclusion, no stress whatever is placed upon any charge of fraud in the bill, inasmuch as it is not charged positively, but only as matter of belief, and it is, to say the least, doubtful whether that mode of statement is sufficient: Story's Eq. Pl., sec. 241, and case cited.

Injunction decreed.

HOMESTEAD, WHAT IS: See *Walters v. People*, 65 Am. Dec. 730, 733; *Rhodes v. McCormick*, 68 Id. 663, 666; *Franklin v. Coffee*, 70 Id. 292, 293; *Pryor v. Stone*, 70 Id. 341, 343, and note; *Stanley v. Greenwood*, 76 Id. 106; *Phelps v. Rooney*, 76 Id. 244, 246; *Tumlinson v. Swinney*, 76 Id. 432, 434; *Ackley v. Chamberlain*, 76 Id. 516, 517; *Kurs v. Brusch*, 81 Id. 435; *Gregg v. Bostwick*, 91 Id. 637.

SALE OF HOMESTEAD UNDER EXECUTION: See *Blue v. Blue*, 87 Am. Dec. 267, and note thereto discussing the subject.

HOMESTEAD EXCESS CAN BE REACHED ON EXECUTION ONLY IN MODE POINTED OUT BY STATUTE: See *Blue v. Blue*, 87 Am. Dec. 267, and note 275; *Fogg v. Fogg*, 77 Id. 715.

EQUITY WILL REMOVE CLOUD FROM TITLE: *Scott v. Onderdonk*, 67 Am. Dec. 106, and note; *Munson v. Munson*, 73 Id. 693; *Polk v. Rose*, 89 Id. 773; or will interfere to prevent a cloud from being cast: *Carlin v. Hudson*, 62 Id. 521, and note; *Guy v. Hermance*, 63 Id. 85, and note; *Scott v. Onderdonk*, *supra*, and note; *Holland v. Mayor etc. of Baltimore*, 69 Id. 195, and note 205.

DUNLAP v. ROGERS.

[47 NEW HAMPSHIRE, 281.]

PRIOR ASSIGNMENT UNDER INSOLVENT LAW OF ONE STATE WILL NOT BE PERMITTED TO PREVAIL against a subsequent attachment of personal property found in another state, by a citizen thereof.

TRUSTEE process. On September 29, 1864, the principal defendant, John Rogers, who was a resident of Massachusetts, filed in that state a petition to be declared an insolvent, and on the same day a warrant was issued by the court requiring its messenger to take possession of his property until the appointment of assignees. On October 11th, the claimants Conner and Stone were accordingly appointed assignees. Rogers was indebted to the plaintiff, Thomas Dunlap, who at the time the debt was contracted and ever since has been a resident of New Hampshire, for money due for goods consigned to the defendant, and by him sold. On October 3d, Dunlap, who had no notice of the insolvency proceedings by Rogers, caused the writ in this case to be issued and served upon the trustees, White and Farnsworth, also residents of New Hampshire, who were indebted to Rogers upon a note, made in Boston, September 19, 1864, and payable sixty days after date, but specifying no place of payment. Conner and Stone claimed that by their appointment as assignees the note in question became their property. The case was submitted upon the foregoing state of facts, and the questions arising on the case were reserved.

S. N. Bell, for the plaintiff.

Morrison and Stanley, for the claimants.

By Court, SARGENT, J. In *Le Chevalier v. Lynch*, Doug. 162, it was said by Lord Mansfield, "that if a bankrupt has money owing to him out of England, as in *St. Christophers, Gibraltar*, etc., the assignment under the bankrupt law so far vests the right to the money in the assignees that the debtor shall be answerable to them, and shall not turn them round by saying he is only accountable to the bankrupt. In Scotland they permit assignees of a bankrupt in England to sue for money owing to the bankrupt in Scotland, and it has been determined at the cockpit, upon solemn consideration, that bills by English assignees may be maintained in the plantations upon demands due to the bankrupt's estate."

But he also held "that if, in the mean time, after the bankruptcy and before payment to the assignees, money owing to

the bankrupt out of England is attached *bona fide*, by regular process, according to the law of the place, the assignee in such case cannot recover the debt."

So in *Potter v. Brown*, 5 East, 124-131, Lord Ellenborough, C. J., says: "It is every day's experience to recognize the laws of foreign countries as binding upon personal property, as in the sale of ships, condemned as prize by the sentences of foreign courts, the succession to personal property by will or intestacy of the subjects of foreign countries. We always import together with these persons the existing relations of foreigners as between themselves, according to the laws of their respective countries; except, indeed, where these laws clash with the rights of our own subjects here, and one or the other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle and laid up amongst our acknowledged rules of jurisprudence, it is needless to discuss it further."

The English cases subsequent to this have been somewhat conflicting. These decisions are reviewed and commented on by Story in his *Conflict of Laws*, sections 404 to 409 inclusive. His conclusion upon such review is, that the courts of England maintain the doctrine of the universal operation of assignments in bankruptcy upon all movable property wherever it may be locally situated at the time of the assignment. The process of reasoning by which this conclusion is reached is substantially as follows: The general principle is, that personal property has no locality, but as to its distribution, it is subject to the law which governs the person of the owner; that is to say, it is subject to the law of his domicile. There can be no doubt that the owner may, by a voluntary assignment or sale made according to the law of his domicile, transfer the title to any person wherever the property may be locally situated. Now, an assignment under the bankrupt laws of his domicile is by operation of law a valid transfer of all the bankrupt's property, as valid as if made personally by him. The law, upon his bankruptcy, transfers his whole property to the assignees, who thus become, *lege loci*, the lawful owners of it, and are entitled to administer it for the benefit of all his creditors. The mode of transfer is entirely immaterial. The only proper question is, whether it is good according to the law of his domicile. This rule is applied in the succession to movable property in cases of intestacy, where the property passes by mere operation of law in the same

manner as by a voluntary act of sale, or where it passes by will. Chancellor Kent came to the same conclusion, upon a review of the English and early American authorities, in the court of chancery in New York, in 1820, in case of *Holmes v. Remsen*, 4 Johns. Ch. 460-487 [8 Am. Dec. 581], in which it was held that by the English law, and by the general international law of Europe, the proceeding which was prior in point of right, and attached to itself the right to take and distribute the estate.

But whatever weight the English or the early New York authorities might otherwise have been entitled to, the great weight of American authorities is now the other way, and it may now be considered as a part of the settled jurisprudence of this country that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicile with regard to the rule of preferences in the case of insolvents' estates. The laws of other governments have no force beyond their territorial limits, and if permitted to operate in other states, it is upon a principle of comity, and only when neither the state nor its citizens would suffer any inconvenience from the application of the foreign law. A prior assignment in bankruptcy under a foreign law will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here, and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad when they have the means to satisfy them under their own control: 2 Kent's Com. 406; Story's Conflict of Laws, secs. 410-421; *Harrison v. Sterry*, 5 Cranch, 289-302; *Ogden v. Saunders*, 12 Wheat. 61-362; *Saunders v. Williams*, 5 N. H. 213; *Sanderson v. Bradford*, 10 Id. 260; *Blake v. Williams*, 6 Pick. 286 [17 Am. Dec. 372]. And the same rule applies as between the different states: *Ingraham v. Geyer*, 13 Mass. 146 [7 Am. Dec. 132]; *Fox v. Adams*, 5 Me. 245.

Upon the principle of comity or courtesy of nations and of states, it is usual everywhere to allow the assignees of the bankrupt, duly appointed pursuant to the laws where the bankrupt dwells, to maintain actions in that character in another state. And it has generally been held, where questions arose in this country between the bankrupt under a foreign law and his assignees under the same law, they both being citizens and subjects of the country enacting the law, where no rights of creditors, citizens of this country, intervened,

that effect should be given here to the foreign law: *Plestor v. Abraham*, 1 Paige, 236; *Abraham v. Plestor*, 3 Wend. 540 [20 Am. Dec. 738]; *Hall v. Boardman*, 14 N. H. 38; *Hoag v. Hunt*, 21 Id. 106; *Smith v. Brown*, 43 Id. 44.

It is said by Yeates, J., in *Milne v. Moreton*, 6 Binn. 353 [6 Am. Dec. 466], that "it is one thing to assert that assignees of bankrupts under foreign institutions should be allowed by the courtesy of nations to support suits, as representatives of such bankrupts, for debts due to them; and it is another thing to give efficacy to those institutions, to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owe allegiance, and from which they are entitled to protection." The right of such assignees thus to sue in a foreign country does not result from the force or effect of the law, but from long-used and well-established comity.

In *Hall v. Boardman*, 14 N. H. 38, it was said that the assignment in Massachusetts, if regular, was sufficient to pass the property in the hands of the trustee in this state to the assignees in Massachusetts, so that the debt due from the trustee in this state to the bankrupt in Massachusetts would be due and payable to the assignees of the bankrupt there, unless the creditor here had acquired some right under our law paramount to such right in the assignees; and it was held in that case that inasmuch as the debt sued here was one upon which the statute of Massachusetts would act directly, and that a discharge of the bankrupt in Massachusetts would discharge the plaintiff's debt, therefore an attachment here upon such a debt would not give the plaintiff any rights against the operation of a law to which his own debt would be subject.

Hoag v. Hunt, 21 N. H. 106, was a case similar in principle to *Hall v. Boardman*, *supra*, and was decided the same way, and upon the same grounds; it being held that the plaintiff's debt was one that would be discharged by the force and operation of the insolvent law of Massachusetts, if the defendant obtained his discharge there. So in *Smith v. Brown*, 43 N. H. 44, we held that the debt, being made and payable by its terms in Massachusetts, was subject to the laws of that state, and would be discharged by the defendant's discharge in insolvency there; and hence that no attachment made on that debt of the insolvent's estate here should avail against the operation of the assignment in that state. This holding

was in accordance with the then recent decisions in this state and in Massachusetts: *Brown v. Collins*, 41 N. H. 405; *Whitney v. Whiting*, 35 Id. 471; *Scribner v. Fisher*, 2 Gray, 43.

But since the decision in the supreme court of the United States in *Baldwin v. Hall*, 1 Wall. 223, and of *Bank v. Butler*, 45 N. H. 236, by this court, we should, of course, now hold differently, not only in *Brown v. Collins*, *supra*, which is expressly overruled in *Bank v. Butler*, *supra*, but also in *Whitney v. Whiting*, *supra*, and in *Smith v. Brown*, *supra*, as the court in Massachusetts have also overruled *Scribner v. Fisher*, *supra*, and other cases holding the same doctrine, in *Kelley v. Drury*, 9 Allen, 27. In these cases the general principle is established that the insolvent law of one state can have no effect whatever in any other state, as against citizens of the latter state holding claims that follow the person of the creditor, no matter where the debt was contracted, or where it was made payable, unless such citizens of such other state voluntarily prove their claims in the state where the law was enacted, and thereby place themselves under the jurisdiction of the law.

And while we should not object, on the principle of comity as between different states, to allow the assignee of an insolvent in Massachusetts or any other state to sue in our courts, in recovering debts due to the insolvent, or in any other way recognize the existence or effect of such a law where the rights of our citizens were not involved, yet when a citizen of this state has a claim against an insolvent of another state, and seeks to enforce the collection of such claim under the laws of this state, upon the property of such insolvent found in this jurisdiction, where such claim would not be discharged or affected by such foreign law, and the creditor has not proved his claim under such law, we should not allow the local law of such other state to have any effect whatever to defeat the claim of our own citizens, under such circumstances.

In the case before us the debt of this plaintiff is not by its terms payable in any particular place, so that it would not come within the principle of *Smith v. Brown*, *supra*, and *Brown v. Collins*, *supra*, and *Whitney v. Whiting*, *supra*, if those decisions had not on that point been overruled. The plaintiff was a citizen of this state when his debt was contracted, and still is. His claim is for money, due for the price of goods which plaintiff consigned to defendant, and which he sold for cash. If the claimants had not appeared, a notice might be

necessary under section 18, chapter 208, of the Revised Statutes, but as the claimants appear, all parties will be bound by the judgment.

Trustee charged.

LAW OF DOMICILE GOVERNS VOLUNTARY TRANSFER OF AND SUCCESSION TO PERSONAL PROPERTY: *Owen v. Miller*, 75 Am. Dec. 502, and note collecting prior cases in this series; *Townes v. Durbin*, 77 Id. 176; *Peterson v. Chemical Bank*, 88 Id. 298; *Minor v. Caldwell*, 90 Id. 390.

EXTRATERRITORIAL EFFECT OF ASSIGNMENTS IN BANKRUPTCY AND INSOLVENCY: See *Ingraham v. Geyer*, 7 Am. Dec. 132, 133; *Milne v. Moreton*, 6 Id. 466, and note; *Holmes v. Remsen*, 8 Id. 581, and note; *Holmes v. Remsen*, 11 Id. 269; *Robinson v. Crowder*, 17 Id. 762; *Abraham v. Plestoro*, 20 Id. 738; *Lowry v. Hall*, 37 Id. 495; *Speed v. May*, 55 Id. 540; *Upton v. Hubbard*, 73 Id. 670; *Walters v. Whitlock*, 76 Id. 607; *Felch v. Bugbee*, 77 Id. 203; *Einer v. Beste*, 82 Id. 129; and see *Hanford v. Paine*, 78 Id. 586, and note.

BALLOU v. HALE.

[47 NEW HAMPSHIRE, 347.]

PARTITION OF LAND BY PAROL IS NOT VALID, notwithstanding the division line was marked and monuments set up, and the parties for several years occupied in accordance with the division so made.

CONVEYANCE BY ONE TENANT IN COMMON OF PART OF LAND BY METES AND BOUNDS IS NOT VALID, as against his co-tenant, unless the assent of the latter to the conveyance is manifested by some proper act.

SEVERAL OCCUPATION, IN ACCORDANCE WITH PAROL PARTITION BETWEEN TENANTS IN COMMON, IS NOT ASSENT by one tenant to a conveyance by his co-tenant, by metes and bounds, of the portion of the land thus assigned to the latter as his share; although if continued for twenty years, and under such circumstances as to make it adverse, it would establish the title.

CONVEYANCE BY ONE TENANT IN COMMON OF PART OF LAND BY METES AND BOUNDS ENTITLES GRANTEE TO STAND IN PLACE OF GRANTOR in respect to the possession and profits of that part; although it can have no effect upon the rights of the co-tenant in respect to partition.

TROVER CANNOT BE MAINTAINED BY ONE TENANT IN COMMON AGAINST CO-TENANT for taking all or any portion of the crops, and merely withholding them, and refusing to allow the former to participate in the use of them.

TROVER for two tons of hay or grass, cut and carried away and converted by the defendant to his own use, in August, 1863, and for a like quantity wrongfully taken and converted by him in August, 1862. In 1846, Beebe Ballou and Arethusa Bucklin, wife of George Bucklin, being tenants in common of a certain tract of land, undertook to make partition of the same, and procured the aid of a surveyor, who surveyed the

land and divided it into equal shares. In that year, or in the following one, the parties made a parcel partition, and put down stakes and stones at the several corners and angles. Ballou took the westerly portion, and Mrs. Bucklin the easterly portion, and the evidence, although conflicting, tended to show that the parties intended to divide the land equally in quantity, according to the survey. The plaintiff, Alonzo Ballou, became the owner of Beebe Ballou's share, on the latter's death, and in 1851 Bucklin and wife conveyed to the defendant, Jeremiah Hale, by a warranty deed, by metes and bounds, the portion of the land which had been assigned to the wife in accordance with the parol partition. The plaintiff occupied the westerly half of the land, from the time he became owner up to 1857, peaceably; but in that year he expressed dissatisfaction with the line, claiming that it extended farther east by two rods than the defendant was willing to admit, forbade the defendant from cutting any more grass upon the disputed territory, and in 1860 and 1861 cut all the grass growing thereon himself. Prior to the commencement of this action, the plaintiff made a demand upon the defendant for one half of the grass. It was agreed that if the court should be of the opinion that the plaintiff could maintain the action, he was entitled to fifteen dollars damages.

Lane, for the plaintiff.

Cushing, for the defendant.

By Court, BELLOWS, J. The partition by parol was not valid, notwithstanding the division line was marked and monuments set up, and notwithstanding the parties for several years occupied in accordance with the division so made. This is too clear to need the citation of authorities, and the doctrine is not controverted by counsel. It is recognized, also, by the recent decision of this court in *Wilder v. Russell*, Cheshire County, December term, 1866.

It is also well settled in New Hampshire that the conveyance by one tenant in common of a part of the land, by metes and bounds, is not valid as against the other tenant in common, unless his assent to it is manifested by some proper act: *French v. Lord*, 1 N. H. 42 [8 Am. Dec. 31]; *Jeffries v. Radcliff*, 10 Id. 242; *Great Falls Co. v. Worster*, 15 Id. 449; *Whitton v. Whitton*, 38 Id. 133 [75 Am. Dec. 163]; *Martin v. Collister*, 38 Id. 455.

What shall constitute a sufficient assent by the co-tenant is not well defined, but it is held in *Great Falls Co. v. Worster*, before cited, that the absence of objection is not proof of dissent, and so is *Duncan v. Sylvester*, 24 Me. 482 [41 Am. Dec. 400]. Upon the same principle, an occupation in accordance with such division is not such assent; although if continued for twenty years, and under such circumstances as to make it adverse, it would establish the title; but here there was no such occupancy.

In *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22], it was held that a parol partition was void, notwithstanding a several occupancy conforming to it; and in *Wilder v. Russell*, cited before, there was such occupancy.

The doctrine that a conveyance of a part of the common property by one tenant is invalid as against the other is based, in all the cases, upon the fact that if sustained it would affect the rights of the other tenant in respect to partition; compelling him to take a share in each of several parcels of the common property, such as his co-tenant might choose to mark out, instead of a share of the whole; and this is the view taken in other states, as in *Bartlet v. Harlow*, 12 Mass. 347 [7 Am. Dec. 76], which is a leading case; *Peabody v. Minot*, 24 Pick. 329; *Duncan v. Sylvester*, 24 Me. 482 [41 Am. Dec. 400]; *Griswold v. Johnson*, 5 Conn. 363; *Smith v. Benson*, 9 Vt. 138 [31 Am. Dec. 614]; 4 Kent's Com., sec. 368, and cases cited; 1 Washburn on Real Property, 410, and notes.

At the same time it is well settled that such a deed is not void or wholly inoperative, as respects the grantor; but will be effective to convey such land if the other tenants shall afterwards, by release or other proper act, assent, or there be a subsequent valid partition by which the land so granted is assigned to the share of the grantor: *French v. Lund*, 1 N. H. 42 [8 Am. Dec. 31]; *Varnum v. Abbot*, 12 Mass. 478 [7 Am. Dec. 87]; *Brown v. Bailey*, 1 Met. 254; *Nichols v. Smith*, 22 Pick. 316; *Soutter v. Porter*, 27 Me. 405; *Cox v. McMullin*, 14 Gratt. 82; 19 U. S. Dig. 415, sec. 24.

Such a deed, then, can be avoided only by the other tenants, but is good against the grantor and his heirs, and may and will operate, so far as it can, without prejudice to the co-tenants.

The question then arises, whether the grantee in this case acquires by this deed the right which his grantor before had to the possession of the land so granted, and the crops upon it.

So far as regards the right of the other tenant to partition, it is clear that he cannot be affected by this conveyance, but has a right to a moiety of the entire land.

If, on the other hand, he might stand in the place of his grantor, as to possession and profits of the land granted, without prejudice to the other tenant, it would be in harmony with the doctrines under consideration to hold that he might do so.

If, instead of an attempt to convey the whole title to the land in question, the grantors had licensed the defendant to enter upon this land, and do just what they might have done, and no more, it would be difficult to see how the plaintiff could have been prejudiced by it. If held to be valid, it certainly could not affect the plaintiff's right on partition to have assigned to him a moiety of the entire property, and it is upon the injury to the other tenants in the matter of partition that the rule is based.

If, then, such a license would be valid, an instrument conveying all the interest which such tenant had, and which would clearly bind him, might well be held to operate to the same extent, and give to the grantee the same right in respect to the possession and profits of that tract, so long as the other tenant did not choose to ask for partition, as the grantor had himself.

Before such grant the grantor was equally with the other tenant entitled to the possession and profits of the entire land after the conveyance; as the grantee acquired no interest in the other portion of the land, the grantor and grantee together would be entitled as respects the tenant to the same share of the profits as if the grantor had conveyed an undivided share of his interest in the whole land, unless by an agreement between the grantee and the other tenant he was allowed to have exclusive possession of the parcel conveyed to him, in which case he would be entitled to hold the whole of the profits of that parcel.

Upon this ground the defendant has received the profits of the parcel conveyed to him for several years, and so long as the arrangement by which this several occupation was had was permitted to continue, the defendant must be regarded as rightfully in the receipt of those profits: 4 Kent's Com., sec. 370, and cases cited.

In the leading case of *Bartlet v. Harlow*, 12 Mass. 347 [7 Am. Dec. 76], the petitioner for partition acquired his title by extent of an execution upon part of the land held in common,

and the court hold that he is not entitled to partition, but say "it does not follow that he is not now entitled to a just proportion of the rents and profits of the land if they can be taken in such a manner as not to infringe the right of the respondent to his share, nor to disturb him in the enjoyment of an undivided moiety of the whole land"; and the court evidently makes a distinction between what may prejudice a co-tenant in respect to his estate or inheritance, and that which may affect the taking of the profits of the common property: *Id.* 352, and cases cited.

In *Tooker's Case*, 2 Coke, 68 a, it is laid down that one joint tenant cannot prejudice his companion as to any matter of inheritance or freehold, but as to the profits of the freehold the one may prejudice the other, for there is a privity and trust between them, and therefore if one takes all the profits there is no remedy for the other, for it was his folly to join himself in estate with such a person as would break trust, to remedy which an action of account is given by statute of 4 Anne, c. 16, although the defendant was not actually bailiff. So in *Reed v. Tucker*, Cro. Eliz. 803. This distinction is recognized in *Bartlet v. Harlow*, 12 Mass. 352 [7 Am. Dec. 76], before cited.

In *Rising v. Stannard*, 17 Mass. 282, it was decided that one tenant in common may make a parol lease of a specific portion of the land, and that the other could not maintain trespass *quare clausum fregit* against the lessee. The court say that all the tenants in common have an equal right to the possession of the land held in common, and may occupy it themselves; or any one may authorize a stranger to occupy under him. It is true that a grant of a part of the common property by a tenant in common has been held to be voidable by the co-tenants. But the ground of that decision does not affect the present question. A parol lease from a tenant in common does not affect the estate of his co-tenant, nor can it have any legal operation to prevent the co-tenant from having partition, and holding in severalty his full share of the common property.

In *Bacon v. Bowdoin*, 2 Met. 591, it was held that where one tenant in common of land conveys a parcel thereof by metes and bounds, and takes back a mortgage and assigns it, the assignee, if he has no claim to the land under the other co-tenant, cannot resist the right of the mortgagor's lessee for years to redeem that mortgage, it being held that this conveyance was valid against all but the other co-tenants.

If, then, a lease by one tenant in common of a portion of the common land is good to entitle the lessee to the possession before held by the lessor, we see no reason for holding that a deed of the whole of a specific portion of the property should not be effectual to give the grantee what the grantor could, in the form of a lease, rightfully convey; and that is, the mere right of possession in common with the rest.

Upon these views, holding the partition to be invalid, we think the defendant must be regarded as standing in the place of his grantors, in respect to the possession and profits of the parcel of land so granted; although the conveyance can have no effect upon the rights of the other tenants in common in respect to partition.

The remaining question, therefore, is, whether one tenant in common can maintain trover for the crops, or any portion of them, taken and carried away by another, that is, for merely withholding them and refusing to allow the other to participate in the use of them.

The case of *Carr v. Dodge*, 40 N. H. 404, seems to be decisive that the action cannot be maintained. In that case the plaintiff's intestate died owning a share of the crops in possession of defendant, who owned the other part, and he refused to deliver to the administrator any part of them, though duly demanded, and it was held that trover would not lie.

This is well sustained by authority: 1 Ch. Pl., 10th Am. ed., 79, 156, 172, 179, and cases cited. Had the property been destroyed by defendant, or sold and converted into money, an action might ordinarily have been maintained, but nothing of that kind exists here.

Under the statute, *assumpsit* might have been found that defendant was by agreement taking the crops upon the land assigned to him by the defective partition.

There must, therefore, be judgment against the plaintiff.

PAROL PARTITION, VALIDITY OF: See *Ryers v. Wheeler*, 37 Am. Dec. 243, and note collecting prior cases; *Calhoun v. Hays*, 42 Id. 275; *Brown v. Wheeler*, 44 Id. 550; *Dow v. Jewell*, 45 Id. 371; *Lynch v. Baxter*, 51 Id. 735; *McMahan v. McMahan*, 53 Id. 481; *Tomlin v. Hilyard*, 92 Id. 118, and note.

CONVEYANCE BY ONE TENANT IN COMMON OF PART OF LAND BY METES AND BOUNDS, VALIDITY OF, AS AGAINST CO-TENANTS: See *Marshall v. Trumbull*, 73 Am. Dec. 667; *Whitton v. Whitton*, 75 Id. 163, and the notes thereto referring to other cases.

TROVER BY TENANT IN COMMON AGAINST CO-TENANT, WHEN MAINTAINABLE: See *Fiquet v. Allison*, 86 Am. Dec. 54, and note collecting prior cases.

GREEN v. PETTINGILL.

[47 NEW HAMPSHIRE, 375.]

ENTRY BY HOLDER OF MORTGAGE UPON ONE OF SEVERAL DETACHED LOTS OF WILD AND UNOCCUPIED LAND in the same county, in the name of all, gives him constructive legal possession of all, so that he may maintain trespass against any person afterwards entering without right upon any of the other lots, if the lots are covered by the same mortgage, upon the same condition.

TRESPASS *quare clausum fregit*, for entering upon lot No. 16 of a certain range, in the town of Milan, and cutting and carrying away the plaintiff's trees growing thereon. The plaintiff introduced a mortgage of several lots of wild and unoccupied land in different ranges in Milan, including lot No. 16, made in 1854, by J. D. Horner, G. A. Hastings, and Henry Paine, to S. J. Heywood, to secure the payment of three notes; and proved a transfer of the notes and mortgage to one Abner Davis, and from Davis to himself. The plaintiff testified that in 1856 he had entered upon some of the lots for the purpose of ascertaining their value, and to foreclose the mortgage, but had never been upon lot No. 16 prior to the alleged trespass. He also introduced evidence to the effect that in the winter of 1859 and 1860, the defendants cut and carried away 282 spruce trees. It was not shown that the mortgagors, the mortgagee, or Davis had any title to any of the lots included in the mortgage, or had made any entry thereon, or were ever in possession thereof. The defendants' evidence tended to show that they were employed by certain persons, Dunn & Co., to cut and haul the timber in question, and that the timber was cut in the town of Cambridge, upon land owned by Dunn & Co. in common with others. No title to lot No. 16 in Milan, or to the adjoining land in Cambridge, was shown in Dunn & Co., or in the defendants. It appeared that there were two lines, about forty rods apart, running nearly parallel across lot No. 16, and that the timber in question was cut between those lines. The plaintiff claimed the more northerly of these to be the true line between Milan and Cambridge, while the defendants claimed the same as to the other. The defendants' counsel contended that the plaintiff could not recover, as no entry upon lot No. 16 in Milan had been shown by him, or those under whom he claimed, prior to the alleged trespass; but the court ruled that where there were several lots of wild land in the same county, and included in the same deed, an actual entry upon one of the lots, claim-

ing the whole prior to the alleged trespass, was sufficient to enable the plaintiff to maintain the action, provided the jury found the timber was actually cut on lot No. 16, in Milan. The jury returned a verdict for the plaintiff. The defendants moved to set the verdict aside; and the questions of law were reserved.

Burns and Fletcher, for the plaintiff.

Benton and Ray, for the defendants.

By Court, SARGENT, J. The defendants claimed that the timber in question was cut in the town of Cambridge, where they or their employers claimed some interest or right. But they claimed no right whatever in the town of Milan to cut this timber. The jury, by their verdict, under the instructions given them, have found that the cutting was in Milan, so that the defendants were trespassers upon some one, if any one had any right to this land or any prior possession of it.

This was a wild lot, of which no one had or retained any actual possession. If possession had ever been taken of this lot by any person having color of title, or claiming the whole lot, by an actual entry upon it, that possession would continue, though there were nothing to give any person notice of it, and a person entering subsequently would be a trespasser, a disturber of the prior possession of the one first entering. But a *quære* is raised in *Hoag v. Wallace*, 28 N. H. 547, whether an entry into one of several lots in town, under color of title to the whole, can be construed to extend to such of the lots as are in a different range from that upon which the entry is made, and which do not adjoin it. Upon examining the opinion in that case, by Eastman, J., we find no authorities cited as the foundation of this position, or of this *quære*, except the remarks of Parker, C. J., in *Bailey v. Carleton*, 12 Id. 9 [37 Am. Dec. 190]; and upon the examination of that case we find that the remarks of the chief justice in that opinion do not warrant the *quære* in the broad and unqualified manner in which it is stated in *Hoag v. Wallace*, *supra*.

In *Bailey v. Carleton*, *supra*, it is nowhere claimed (but the contrary is constantly assumed to be true) that an entry upon one lot of unoccupied land under a deed which conveyed several similar lots in the same town would not give sufficient constructive legal possession of all these lots, so that the person thus entering might maintain trespass against a party who should enter subsequently upon any of these lots, and

cut timber or do other acts without right or title. But it is held that when a party having a deed embracing land to which his grantor had good title, and other lands to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into the part which he could not lawfully convey, he has no adverse possession of the latter as against the true owner. The doctrine of the case is plainly that an entry by the grantee into one of several lots, all conveyed to him in the same deed, would give him constructive legal possession of all the lots thus conveyed as against his grantor, and as against a person subsequently entering any of said lots without right; yet that such constructive possession of a lot on which he did not actually enter would not constitute such an adverse possession as would give title to the land by twenty years continuance, as against a third person who should afterwards show that he was the real owner of such last-mentioned lot. And the reasons given for this distinction are entirely satisfactory, and it is only when such constructive possession of a lot, under color of title which proves not to be a valid title to such lot, is attempted to be converted into an adverse possession against the real owner of the lot, that the *quære* as stated in *Hoag v. Wallace, supra*, applies.

With that limitation it is well enough; but in the broad and unqualified form in which it is there stated, it will be found to be in conflict with all the authorities. Littleton says: "If a man hath cause to enter into any lands or tenements in diverse townes in one same county, if he enter into one parcell of the lands or tenements which are in one towne, in the name of all the lands or tenements into which he hath right to enter within all the townes of the same county; by such entrie he shall have as good a possession and seizin of all the lands and tenements whereof he hath title of entrie, as if he had entered in deed into every parcell": Litt., sec. 417.

But Lord Coke says that this general rule must be understood with this limitation, that the entry of a man to recontinue his inheritance or freehold must ensue his action for the recovery of the same, and hence the rule is limited to lands in the same county. "For if the lands lie in several counties, there must be several actions, and consequently several entries. So if three men disseise me severally of three several acres of land, being all in one county, and I enter into one

acre in the name of all three acres, this is good for no more but for that acre which I entered into, because each disseisor is a several tenant of the freehold, and as I must have several actions against them for recovery of the land, so my entry must be several." He also says: "If I enfeoff one of one acre of ground upon condition, and at another time I enfeoff the same man of another acre in the same county upon condition also, and both the conditions are broken, an entry into one in the name of both is not sufficient; for that I have no right to the land, nor action to recover the same but a bare title, and therefore several entries must be made into the same in respect to the several conditions. But an entry into one part of the land, in the name of all the land subject to one condition, is good, although the parcels be separate and in several towns": Co. Lit. 252 b.

So Richardson, C. J., in *Riley v. Jameson*, 3 N. H. 27 [14 Am. Dec. 325], says when a man enters into land under a deed or extent, or as heir to another, such entry will give him possession of all the land which the title under which he enters embraces; because he is presumed to enter, claiming according to his title. For this purpose it is immaterial whether the title under which he enters be a valid one or not. This doctrine is reiterated in *Towle v. Ayer*, 8 N. H. 59; *Breck v. Young*, 11 Id. 485; and also by Parker, C. J., in *Bailey v. Carleton*, *supra*.

In case of mortgages, it is held in *Bennett v. Conant*, 10 Cush. 165, by Shaw, C. J., that the mortgage of several detached parcels of land in the same county by one deed to perform one condition does, as between such parties, constitute them to be one tenement or holding for the purpose of securing the performance of the condition, and as between those parties and their privies an entry on one is an entry on the whole.

This court held substantially the same doctrine in *Green v. Cross*, 45 N. H. 574, where several detached lots of wild land in the same town were conveyed in mortgage by one deed and upon one condition, that as between the parties where the lands were wild and unoccupied, and where an actual entry can give no notice to any one interested, an entry upon one tract in the name of all in the same county is an entry upon all according to the general rule in Co. Lit. 252 b.

And we think, upon the authority of *Bailey v. Carleton*, 12 N. H. 17 [37 Am. Dec. 190], that such entry on one wild lot, in the name of all in the same county, would give constructive

legal possession of all the other wild and unoccupied lots in the same county, if conveyed in the same deed and upon the same condition with the first, so that the party thus entering on one might maintain trespass against any person afterwards entering without right upon any of the other lots thus conveyed.

How far such constructive possession could be held to be adverse to a third person, who should afterwards show that he was the real owner of some one of said lots, not actually entered upon, having a title paramount to the plaintiff's title, need not be considered, as the point is not raised. Here the plaintiff, having a mortgage deed of several lots in the town of Milan, and having entered upon some of these lots for the purpose of foreclosing his mortgage on the whole, entered of course claiming the whole, and that gave him constructive possession of the whole, as against the mortgagors, and as against these defendants, who, as the jury have found, were trespassers without right.

Judgment on the verdict.

ENTRY UPON ONE OF SEVERAL PARCELS OF LAND, AS ENTRY UPON ALL. — The doctrine announced by the principal case that an entry upon one lot of land under a deed which conveys several lots in the same county, upon the same condition, is an entry upon all, so as to enable him to maintain actions depending thereon, is sustained by the authorities: Co. Lit., sec. 417; *Bennett v. Conant*, 10 Cush. 165; *Lennon v. Porter*, 5 Gray, 318, 320; *Hawkes v. Brigham*, 16 Id. 561, 565; *Green v. Cross*, cited in the principal case; and see *Bailey v. Carleton*, 12 N. H. 9; S. C., 37 Am. Dec. 190.

POSSESSION OF PART OF TRACT OF LAND AS POSSESSION OF ALL. — As noticed in the principal case, where a person enters into possession of a part of a tract of land, under color of title to the whole tract, this will operate as a possession of the entire premises described in his deed of conveyance: Note to *Taylor v. Buckner*, 12 Am. Dec. 357; *Kennebec Purchase v. Springer*, 3 Id. 227; *Hammond v. Ridgely*, 9 Id. 522; *Daniel v. Ellis*, 10 Id. 707; *Carson v. Burnett*, 30 Id. 143; *Jones v. Perry*, 30 Id. 430; *Crowell v. Bebee*, 33 Id. 172; *Casey's Lessee v. Inloes*, 39 Id. 658; *Overton's Heirs v. Davisson*, 42 Id. 544; *Altemus v. Long*, 45 Id. 688; *McColman v. Wilkes*, 51 Id. 637; *McLaurin v. Salmons*, 52 Id. 563; *Marcy v. Stone*, 54 Id. 736; *Royall v. Lessee of Lisle*, 60 Id. 712; *Williams v. Ballance*, 74 Id. 187; *Hicks v. Coleman*, 85 Id. 103; and on the other hand, where a person enters adversely, without any deed or color of title, he is restricted to the land actually occupied by him: Note to *Taylor v. Buckner*, *supra*; *Kennebec Purchase v. Springer*, *supra*; *Hall v. Powel*, 8 Id. 722; *Riley v. Jameson*, 14 Id. 325; *Royall v. Lessee of Lisle*, *supra*; *City of St. Louis v. Gorman*, 77 Id. 586. See also *Jackson v. Woodruff*, 13 Id. 525; *Proprietors of Enfield v. Day*, 28 Id. 360; *Doe ex dem. Loftin v. Cobb*, 62 Id. 173; *Denham v. Holeman*, 71 Id. 198.

PERKINS v. PROUT.

[47 NEW HAMPSHIRE, 337.]

BURDEN OF PROOF IS UPON INDORSEE OF PROMISSORY NOTE of showing that he is a *bona fide* holder, for value, in an action upon the note by him against the maker, when the note was obtained from the maker by fraud. **TO SHOW FRAUDULENT INTENT WITH WHICH REPRESENTATIONS WERE MADE**, evidence of other fraudulent representations of a similar character, made by the same person, and about the same time, is admissible

ASSUMPSIT upon a promissory note made by the defendant to the order of one Putney, and indorsed by the latter to the plaintiff. The note was given in payment of an interest in certain oil lands in West Virginia, which the defendant was induced to purchase through the alleged fraudulent representations of Putney. For the purpose of showing Putney's fraudulent intent in making the representations, the court permitted the defendant to prove other similar alleged fraudulent representations made by Putney to other persons, about the same time, in connection with the same subject-matter. The court ruled that the burden of proof was upon the plaintiff to show that he received the note before maturity, and without knowledge of the fraud, or of such facts and circumstances as should have put him upon inquiry; and that if the defendant had received anything of value as the consideration of the note, he could not rescind the contract, and avoid payment of the note, without first restoring or offering to restore what he had thus received. The defendant had a verdict, which the plaintiff moves to set aside.

Morrison and Stanley, for the plaintiff.

Sawyer and Sawyer, Jr., for the defendant.

By Court, BELLOWS, J. It must be considered as settled in this state, that if a promissory note was obtained by fraud or duress, or upon an illegal consideration, and it is held in the name of an indorsee, the burden is upon him to prove that he is a *bona fide* holder, and for value: *Clark v. Pease*, 41 N. H. 414; *Garland v. Lane*, 46 Id. 245.

Such were the instructions substantially in the case before us. As the evidence tended to prove that the note was obtained by fraud, it was proper and necessary to tell the jury upon whom the burden of proof rested in respect to the good faith of the transfer, leaving it to them to determine the question of fraud on the evidence. In respect to that evidence the court

gave no opinion, and there is no exception to any instructions as to its competency to be considered.

The reason for casting the burden of proof upon the indorsee in such cases is to be found in the presumption, based upon experience in such cases, that a person who has illegally or fraudulently obtained a promissory note will generally cause it to be sued in the name of an indorsee, with a view to shut out or embarrass the defense that might otherwise be made. For this reason, such transfers are usually regarded with suspicion; and hence the rule which throws the burden of proof upon the indorsee, who must very generally have the best means to show what the facts really are.

The proof of other fraudulent representations of the payee about the same time, and of a similar character, was admitted to show his fraudulent intent in this case, not to render it probable that he made such representations to defendant; and such evidence is admissible for that purpose. This is settled by the case of *Bradley v. Obear*, 10 N. H. 477, where the principle involved was the same as in the case at bar.

Upon the same ground, proof of other conveyances made about the same time as the conveyance in question, and with intent to defraud creditors, is admissible: *Whittier v. Varney*, 10 N. H. 294, and cases cited.

Indeed, when the knowledge and intent of a party is a material fact, proof of matters apparently collateral is admissible in many cases, both civil and criminal: 1 Greenl. Ev., sec. 53, and notes, and numerous cases cited; 4 Stark. Ev. 377; Roscoe's Crim. Ev. 94. Among the cases of this sort are indictments for altering counterfeit money; and then altering other and similar counterfeit money about the same time, or having it in the prisoner's possession, may be received upon the question of guilty knowledge.

So in actions for slander, proof of other language used about the same time is admissible to show malice: 2 Starkie on Slander, 54-57.

In Roscoe's Crim. Ev. 94, before cited, it is laid down without qualification, that wherever the intent of the prisoner forms part of the matter in issue, evidence may be given of other facts not in issue, provided they tend to establish the intent of the prisoner in committing the act in question, and the authorities cited by him fully sustain the doctrine.

The instructions as to the necessity of restoration were correct, and the exception appears not to be insisted upon.

Judgment on the verdict.

BURDEN OF PROOF IS UPON INDORSEE OF NEGOTIABLE PAPER of showing that he is a *bona fide* holder for value, if fraud, duress, or illegality in the inception of the paper is shown: *Beltzhoover v. Blackstock*, 27 Am. Dec. 330; *Morgan v. Yarborough*, 33 Id. 553; *Ellicott v. Martin*, 61 Id. 327; *Clapp v. County of Cedar*, 68 Id. 678, 692; *Fuller v. Hutchings*, 70 Id. 746; *Paton v. Coit*, 72 Id. 58; *Davis v. Bartlett*, 80 Id. 375; *Harbison v. Bank of State of Indiana*, 92 Id. 308.

HUNT v. WRIGHT.

[47 NEW HAMPSHIRE, 896.]

CONDITION IN CONVEYANCE OF LAND IN UNDIVIDED SHARES to the individual members of an association for the purpose of erecting and managing a hotel, that the land was to be held in common, without partition or division, subject to the articles of the association, is not invalid as repugnant to the estate granted, or upon grounds of public policy; and each of the grantees, and those claiming under them, are estopped to claim partition as against the others.

PETITION for partition by Israel Hunt against Otis Wright. On March 25, 1847, Hunt and others entered into articles of association for the purpose of erecting and managing a hotel in Nashua to be known as the Pearl Street House. The capital stock was twelve thousand dollars, divided into 120 shares of one hundred dollars a share. It was provided that "holders of shares to the amount of two thirds of the whole shall be a quorum to transact business," and that "all questions shall be decided by a majority of votes cast, each stockholder being entitled to one vote for every share he owns." On the same day one Stevens conveyed the land in question to Hunt and his associates by deeds containing the following condition: "Provided, however, and this conveyance is upon the condition that said premises are to be held by the said Hunt and his heirs and assigns in common with the tenants of the other undivided parts of said tract hereby conveyed, without partition or division, subject to the articles of association entered into on the 25th of March, 1847, by the proprietors of the Pearl Street House." Hunt's share amounted to two undivided one hundred and twentieth parts of the land. Hunt and his associates erected a hotel, and managed the same until about May, 1849, since which time there has been no meeting of the association, but the hotel was managed by one Noyes, the owner of one hundred and eighteen one hundred and twentieth parts, until about 1856, when Noyes sold out his interest to Wright, who continued to occupy the premises in

the same manner as by Noyes, without paying Hunt any rent. The foregoing facts were agreed upon for the purposes of the decision.

A. W. Sawyer, for the plaintiff.

Bailey, and Eastman and Cross, for the defendant.

By Court, BARTLETT, J. The proviso in the deed is not repugnant to the estate granted, for originally at common law a tenant in common could not be compelled to make partition: Litt., sec. 318; Co. Lit. 187 a; 2 Bla. Com. 194; and the right given by statute, being for the benefit of the party, may be waived by him: *Coleman v. Coleman*, 19 Pa. St. 100 [57 Am. Dec. 641]; Broom's Leg. Max. 547. It is not in restraint of alienation, for each tenant may convey his share at his pleasure, nor does it prevent a beneficial enjoyment of the profits, for by the articles of association the rents, after deducting the incidental expenses, are to be divided among the tenants in proportion to their shares; it is merely a partial and temporary restriction as to the mode of occupation: *Gray v. Blanchard*, 8 Pick. 289. Similar provisions have frequently been treated as valid: 1 Shep. Touch. 129, 130; *Gray v. Blanchard*, 8 Pick. 289; *Gillis v. Bailey*, 17 N. H. 18; S. C., 21 Id. 150; *Emerson v. Simpson*, 43 Id. 475 [80 Am. Dec. 184]; *Chapin v. School District*, 35 Id. 451; *Woods v. Cheshire Co.*, 32 Id. 423; *Savage v. Mason*, 3 Cush. 500; *Richardson v. Merrill*, 21 Me. 49; *Fisher v. Dewerson*, 3 Met. 546; *Parsons v. Miller*, 15 Wend. 564; *Stuyvesant v. Mayor*, 11 Paige, 414; *Cornelius v. Ivins*, 26 N. J. L. 376; *Southard v. Railroad*, 26 Id. 13; *Collins v. Marcy*, 25 Conn. 242; *Hooper v. Cummings*, 45 Me. 359; *Pennsylvania R. R. v. Parke*, 42 Pa. St. 31; and although the provision in some of these cases was by covenant, yet alienation can no more be restrained by covenant than by condition: 2 Greenleaf's Cruise, sec. 6, note; Platt on Covenants, sec. 569.

Nor is the proviso invalid as creating a perpetuity. The policy of the law has been opposed to perpetuities, because they prevent the free alienation of property: 4 Kent's Com. 264; 1 Jarman on Wills, 219; 1 Shep. Touch. 130. It has been said that "a grantor when he conveys an estate in fee cannot annex a condition to his grant absolutely restraining alienation; . . . such restriction being imposed on him to prevent perpetuities; but short of that restriction the parties may model it as they please": Platt on Covenants, 404; *Mitchinson*

v. *Carter*, 8 Term Rep. 60; Broom's Leg. Max. 539. Here the proviso imposes no restraint upon alienation, and does not at any time prevent a beneficial enjoyment of the property and of its profits; it would seem to have no greater tendency to perpetuity than the original rule of the common law as to the partition of such estates, and indeed, it creates no greater restrictions than often exist in cases of real estate devoted by grant to the uses of copartnerships or corporations; and many of the cases cited, to which others might be added, show conditions or covenants limiting the mode of enjoyment of the property conveyed quite as strictly, and creating quite as much if not more difficulty in alienation than the provision in question. The conditions, being subject to the articles of association, is to continue only till the objects of the association are accomplished: *Coleman v. Coleman*, 19 Pa. St. 100 [57 Am. Dec. 641]. Under the articles of association, those objects are "the erecting and managing" of a hotel on a certain lot of land in Nashua, and the provision is made that "holders of shares to the amount of two thirds of the whole shall be a quorum to transact business," and that "all questions shall be decided by a majority of votes cast, each stockholder being entitled to one vote for every share he owns"; so that under these articles power is given to dissolve the association at any time; and aside from these specific provisions in the articles, adequate powers of dissolution can be found in equity: Story on Partition, secs. 275-291, and note. In any view, therefore, the proviso does not create an obligation that in law should be deemed perpetual: *Goesele v. Bimeler*, 14 How. 608.

We are therefore of opinion that the proviso is not invalid as repugnant to the estate granted, or upon grounds of public policy: *Coleman v. Coleman*, 19 Pa. St. 100 [57 Am. Dec. 641]; *Goesele v. Bimeler*, 14 How. 608; 1 Co. Lit. 165 a; and see *Brown v. Lutheran Church*, 23 Pa. St. 495; *Conant v. Smith*, 1 Aik. 67 [15 Am. Dec. 669]; *Black v. Tyler*, 1 Pick. 152.

The words used in the proviso are apt to create a condition: *Gray v. Blanchard*, 8 Pick. 289, Com. Dig., tit. Condition, A, 2; Bac. Abr., tit. Condition, A, E; *Portington's Case*, 10 Coke, 42 a; and though this might not of itself prevent a clause from being also a covenant (Bac. Abr., tit. Condition, G; Platt on Covenants, 72; *Cromwell's Case*, 2 Coke, 71 b; Shep. Touch. 163), we need not here inquire whether the grantee, not executing such a deed, can be held as a covenantor, or whether

the words are sufficient to raise a covenant, nor question the general rule that no one but the grantor and his heirs can take advantage of a condition; for here the petitionee does not seek to take advantage of a condition as such, which can only be by enforcing forfeiture: 2 Greenleaf's Cruise, 32; but the petitioner makes his title and founds his claim to partition solely upon a deed, the condition of which is, that he shall not have partition. If the proceeding had been against Stevens, his grantor, Hunt, would have been estopped to assert such a claim, for it would have been in conflict with the condition in the deed of Stevens upon which he holds his estate: *Robinson v. Leavitt*, 7 N. H. 76; *Bates v. Norcross*, 17 Pick. 22; Co. Lit. 365 b; and inconsistent with the terms of that deed by virtue of which he makes the claim; and although the grantee in a deed poll, merely as such, may not be estopped by its acceptance, yet as against his grantor and his privies, where he is making his title under such a deed, and asserting his claim solely by reason of it, he is estopped to enforce such claim if it is inconsistent with the valid provisions of the deed: Chitty on Contracts, 6; 2 Smith's Lead. Cas., Am. ed., 538; Co. Lit. 352 a; Com. Dig., tit. Estoppel, A, 3; *Jackson v. Ireland*, 3 Wend. 99; *Wilder v. Russell*, Cheshire, August, 1866; *Great Falls Co. v. Worcester*, 15 N. H. 415, 457; *Thellusson v. Woodford*, 13 Ves. 218; *Green v. Kemp*, 13 Mass. 519 [7 Am. Dec. 169]; *Flanders v. Jones*, 30 N. H. 163; *True v. Condon*, 44 Id. 58; *Russell v. Dudley*, 3 Met. 149; *Brown v. Snell*, 46 Me. 446; *Chautauque Co. Bank v. Risley*, 4 Denio, 480; *Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 570 [49 Am. Dec. 189]; *Oakley v. Perry*, 3 Ohio St. 347; *Gerrish v. Proprietors Union Wharf*, 26 Me. 384 [46 Am. Dec. 568]; *Funk v. Newcomer*, 10 Md. 316; *Coleman v. Coleman*, 19 Pa. St. 112 [57 Am. Dec. 641]; *Rosell v. Wickham*, 36 Barb. 386; *Smith v. Smith*, 14 Gray, 532; *Smith v. Guild*, 34 Me. 443; *Thompson v. Thompson*, 19 Id. 239, 240 [36 Am. Dec. 751]; *Flagg v. Mann*, 14 Pick. 482; and see *Parker v. Brown*, 15 N. H. 188; *Hamblett v. Hamblett*, 6 Id. 339; *Hazelton v. Batchelder*, 44 Id. 43; *Pitts v. Gilliam*, 1 Head, 550; and *Wedge v. Moore*, 6 Cush. 8.

Stevens would also be estopped to claim partition against Hunt and his privies, for such a claim would obviously be inconsistent with the condition in his deed, and with the title he has thereby conveyed: 2 Smith's Lead. Cas. 456; 4 Kent's Com. 261, note; Com. Dig., tit. Estoppel, A, 2; *Thompson v. Thompson*, 19 Me. 242 [36 Am. Dec. 751]; and see *French v.*

Bent, 43 N. H. 449. Between Wright, holding under a like deed, and his grantor, Stevens, a similar estoppel would exist; and as both he and Hunt claim under such deeds from the same grantor, executed and accepted in pursuance of a common arrangement and in furtherance of a common object, and as parts of one general transaction between these parties and their associates, they and those claiming under them are equally estopped as against each other, when they assert claims under those deeds: Com. Dig., tit. Estoppel, B; Co. Lit. 352 a; *Corbett v. Norcross*, 35 N. H. 99; *Hill v. Hill*, 4 Barb. 430; *Jones v. Johnston*, 18 How. 150.

The case does not find that the association has been dissolved, but simply that no meeting of the association has been held since May, 1849, but neither by the articles of association: Wordsworth on Joint Stock Companies, 392, 393; and see Story on Partnerships, secs. 280, 282; 3 Kent's Com. 53, 60, 61.

The petition must therefore be dismissed.

PARTITION BETWEEN TENANTS IN COMMON IS NOT COMMON-LAW RIGHT: Note to *Nichols v. Nichols*, 67 Am. Dec. 703; and it may be waived: *Coleman v. Coleman*, 57 Id. 641; and see *Conant v. Smith*, 15 Id. 669.

RESTRAINTS ON ALIENATION, VALIDITY OF: See *De Peyster v. Michael*, 57 Am. Dec. 470, and exhaustive note.

CONDITIONS, WHETHER WITHIN RULE AS TO PERPETUITIES: See note to *Barnum v. Barnum*, 90 Am. Dec. 103, where the question is considered, and the principal case cited.

CONDITION IN DEED CAN ONLY BE TAKEN ADVANTAGE OF BY GRANTOR OR HIS HEIRS: *Cross v. Carson*, 44 Am. Dec. 742, and note 758; *Bangor v. Warren*, 56 Id. 657.

BAKER v. HASKELL.

[47 NEW HAMPSHIRE, 479.]

DEPOSIT OF DEED WITH THIRD PERSON IS NOT GOOD DELIVERY TO GRANTEE, if the grantor continues till his death to have the right to recall the deed, and no such arrangement has been entered into between the depository and the grantee as to create a privity between them, although the grantor may never have recalled it.

DECLARATIONS OF ANCESTOR ARE ADMISSIBLE against those claiming as his heirs at law.

DECLARATIONS OF GRANTOR, SUBSEQUENT TO GRANT, ARE NOT ADMISSIBLE against his grantee.

WRIT of entry by Abel W. Baker and wife against Joseph Haskell, Jr., for an undivided eighth part of a certain tract

of land. Mrs. Baker and the defendant were two of eight surviving children of Joseph Haskell, Sen., who died in possession of the premises, April 19, 1865. The defendant claimed under a deed to him from his father, dated October 20, 1856, and recorded May 13, 1865. The defendant proved the execution of the deed by one of the subscribing witnesses; and to prove its delivery called one Dr. Caverly, who testified that Joseph Haskell, Sen., had told the witness that his son, the defendant, who had recently married, wished him to make some arrangement of his property; that he always meant to do well for his son, but that he did not know how the son would use property; that he gave the witness a paper, saying that it was a writing in favor of his son, which he wanted the witness to take and keep in his possession until a proper time to produce it; that the witness carried the writing home, but did not know what its contents were; and that he kept the writing until a short time after Joseph Haskell, Sen., died, when he sent it to the defendant. The witness identified the deed as the writing which he had had in his possession. One Buttrick, who was the administrator of Haskell's estate, testified that he sent for the defendant, to show the effects of the deceased to be appraised, and the defendant pointed out the land in question as part of the property to be appraised. The plaintiffs objected that there was no competent evidence that the deed was delivered so as to vest the title in the defendant. The defendant offered to show that about two months before he died, Joseph Haskell, Sen., refused to sell the land, for the reason that he had conveyed it to the defendant, to which the plaintiffs objected. The case was by consent taken from the jury, in order to settle the legal questions raised on the trial.

Cushing, Woodward, and Wellington, for the plaintiffs.

Wheeler and Faulkner, for the defendant.

By Court, SMITH, J. Since the decision in *Cook v. Brown*, 34 N. H. 460 (overruling *Shed v. Shed*, 3 Id. 432), it must be regarded as the established doctrine of this state that placing a deed in the hands of a third person is not a good delivery, unless the grantor parts with his dominion over the deed. If the grantor continues till his death to have the right to recall the deed from the depository, there is no delivery: See also *Bank v. Webster*, 44 Id. 269; *Johnson v. Farley*, 45 Id. 505.

In *Winkley v. Foye*, 33 Id. 171 [66 Am. Dec. 715], it was held, in accordance with what we understand to be the general rule, that a party who deposits money with another to be appropriated for the benefit of a third person, being under no legal obligation so to appropriate it, has a right to countermand the appropriation, and recall the money at any time before it has been actually appropriated, or before such an arrangement has been entered into between the depository and the person for whose benefit it was deposited, as creates a privity between them and amounts to an appropriation of it; anything short of this is immaterial and unimportant so far as concerns the depositor's right to recall and recover back his money: See also *Perry's Petition*, 16 Id. 44, 46. No reason is perceived why the same principle should not apply to the deposit on a deed. In the present case, there is no evidence of any arrangement between the depository and the grantee creating any privity between them. On the contrary, it would seem from the testimony of the grantor's administrator that the grantee never knew of the existence of the deed till after the grantor's death. The grantor never lost his right to control the deed, and could have maintained trover for it against the depository after a demand and refusal.

Under the above decisions in this state, we must hold that there is nothing in the testimony of Dr. Caverly and Mr. Buttrick from which a jury could find a delivery to the defendant; and if no further testimony than that of these two witnesses should be introduced upon a subsequent trial, it will then be the duty of the court to direct a verdict for the plaintiffs.

There are reported decisions in this state and elsewhere which may seem to imply that the validity of a delivery in a case like the present depends solely upon the grantor's intention: See Parker, C. J., in *Hayes v. Davis*, 18 N. H. 600, 602; Wilcox, J., in *Boody v. Davis*, 20 Id. 140, 142, 143 [51 Am. Dec. 210]; *Parker v. Dustin*, 22 Id. 424; *O'Kelly v. O'Kelly*, 8 Met. 436. But where, as in this case, there is no question of estoppel, it is difficult to see how the grantor's intention to part with all dominion over the deed (supposing such intention to have existed) can avail the grantee if no act has been done which will in law be regarded as carrying out this intention and as barring his right to recall the deed. If a grantor, after demand and refusal, should bring trover against a depository who had had no communication with the grantee, the depository could not set up the defense that the grantor, when

he gave him the deed, did not intend to retain the right to recall it. The grantor has a right to change his mind and recall the deed at any time before the depository has entered into an arrangement with the grantee to hold it for him or deliver it to him. The fact that in this instance the grantor did not recall the deed is immaterial. If he had the right to recall it, there was no delivery: *Cook v. Brown, ubi supra*.

The declarations of Joseph Haskell, Sen., if relevant to the issue, are competent evidence for the defendant against these plaintiffs claiming as his heirs at law. "The admissions of the person under whom a party claims, made while he is alleged by such party to have held the title, are evidence against such party": *Morrill v. Foster*, 33 N. H. 379; *Little v. Gibson*, 39 Id. 505; *Hurlburt v. Wheeler*, 40 Id. 73; *Hodges v. Hodges*, 2 Cush. 455; see also *Hobbs v. Cram*, 22 N. H. 130. The plaintiffs, claiming as heirs at law, allege the title to have been (as the possession is admitted by both parties to have been) in Joseph Haskell, Sen., to the day of his death. If, however, the statement "that he had conveyed it to the defendant" was merely a statement of the grantor's understanding of the legal effect of the acts stated in Dr. Caverly's testimony, it is immaterial. It does not appear to have been said to the depository or to the grantee, and could not make or perfect a delivery if there had been none before. The evidence should be submitted to the jury with instructions to disregard it, unless they find that it relates to other or further transactions than those detailed by Dr. Caverly.

The declarations of Joseph Haskell, Sen., offered by the plaintiffs, are not evidence against this defendant, if made after the deposit of the deed with Dr. Caverly. It is true that both parties claim under the declarant; but the defendant's claim dates from the deed, not, like the plaintiffs', from the death of the declarant.

The defendant is bound by all his grantor's declarations up to the time of the alleged grant, on the ground that his grantor and he are identified in interest. But this identity ceases when the conveyance is made, for it then becomes the interest of the grantor to limit and defeat the operation of his conveyance. If the subsequent declarations of the grantor are admissible in behalf of his heirs, they would have been equally so in behalf of himself, thus giving him the power of indirectly revoking his own grant. By a conveyance, a grantee succeeds to the title as qualified by the admissions of

his grantor, made before the conveyance; but this title is not subject to be impaired or defeated by any subsequent declarations of the grantor: *Hurlburt v. Wheeler*, 40 N. H. 73, 76, 77; *Bartlet v. Delprat*, 4 Mass. 702; *Aldrich v. Earle*, 13 Gray, 578; *Clarke v. Waite*, 12 Mass. 439; see also *Smith v. Powers*, 15 N. H. 546.

Case discharged.

FORMAL DELIVERY OF DEED TO GRANTEE IN PERSON IS NOT NECESSARY: *Wood v. Ingraham*, 51 Am. Dec. 671, and note collecting prior cases; *Wellborn v. Weaver*, 63 Id. 235; *Wall v. Wall*, 64 Id. 147; *Morrison v. Kelly*, 74 Id. 169; *Walker v. Walker*, 89 Id. 445. As to the recording of a deed amounting to delivery, see *Newlin v. Osborne*, 67 Id. 269, and note; *Bullitt v. Taylor*, 69 Id. 412; *Jackson v. Cleveland*, 90 Id. 266. But the deposit of a deed with a third person is not a good delivery to the grantee, if the grantor continues till his death to have the right to recall the deed: *Jones v. Jones*, 16 Am. Dec. 35, and note 41; *Gilmore v. Whitesides*, 31 Id. 563; note to *Wellborn v. Weaver*, 63 Id. 244.

DECLARATIONS OF GRANTOR SUBSEQUENT TO GRANT ARE NOT IN GENERAL ADMISSIBLE against the grantee: Note to *Horton v. Smith*, 42 Am. Dec. 632; *Thompson v. Thompson*, 68 Id. 638, 642; *Grant v. Lewis*, 80 Id. 785; but it is otherwise as to prior declarations: *Horton v. Smith*, 42 Am. Dec. 628, and note; *Dow v. Jewell*, 45 Id. 371; *Newlin v. Osborne*, 67 Id. 269. The principal case is quoted on this point in *Worthing v. Worthing*, 64 Me. 337.

CLOSSON v. MORRISON.

[47 NEW HAMPSHIRE, 482.]

OFFICER WHO ARRESTS PERSON FOR COMMISSION OF CRIME MAY SEARCH HIM to ascertain if deadly weapons, money, or articles of value are on his person or in his possession, by means of which the prisoner might commit violence or effect his escape, and if found, may seize and hold them until the prisoner is discharged, or until they are otherwise properly disposed of; and the officer will not be liable therefor, if he acts in good faith, and from a due regard to the safety of himself or of the public, or the security of the prisoner.

IT IS QUESTION OF FACT FOR JURY WHETHER OFFICER TAKING PROPERTY FROM PRISONER, arrested for the commission of a crime, acted *bona fide* and for a proper purpose, or *mala fide* and for an improper purpose.

ATTACHMENT OR LEVY IS VOID, IF OFFICER UNLAWFULLY GETS POSSESSION OF DEBTOR'S PROPERTY, and then attaches it on mesne process, or levies upon it on execution.

ATTACHMENT OF PROPERTY TAKEN BY OFFICER FROM PERSON OF ONE ARRESTED FOR COMMISSION OF CRIME IS VOID, if the officer takes the property simply for the purpose of getting possession of it, so that he might attach it on writs which he then held or expected to receive; but if he takes it in good faith, to secure the safe-keeping of the prisoner, an attachment of it by him on a writ which then comes into his hands is valid.

PRESUMPTION SHOULD BE THAT OFFICER ACTED IN GOOD FAITH in taking property from the person of one whom he arrests for the commission of a crime, and attaching the same on a writ which then comes into his hands, if there is no evidence on the question, or the evidence is equally balanced, although the facts should be submitted to the jury, who should find upon a preponderance of all the evidence.

TROVER for legal-tender notes, coins, a watch and chain, and a wallet. The defendant, a deputy sheriff, arrested the plaintiff on a complaint for larceny, made by one Ford, took him before a justice of the peace, and on adjournment of the hearing, of his own motion, searched the person of the plaintiff, and took from him the property in question. On the next day the defendant attached the property on two writs, then put into his hands, against the plaintiff, one in favor of Ford, the other in favor of one Cox, made by Ford's direction. The defendant also made additional attachments of the same property a few days thereafter, on other writs received by him. The defendant claimed that it was necessary for him to search and take from the plaintiff the property, to insure the safe-keeping of the plaintiff; that he did so in good faith; that the necessity and good faith are to be presumed, and that having so taken the property, he could properly attach it on the writs which afterwards came into his hands. The plaintiff claimed that the burden of proof as to the existence of the necessity for the search and seizure, and as to the good faith of the defendant, rested upon the defendant; that any abuse by the defendant of his authority would make him a trespasser *ab initio*; and that the attachment of the property, which the defendant had in his hands simply to insure the safe-keeping of the plaintiff, and which for all other purposes was still on the person of the plaintiff, was an abuse of the authority under which the defendant took and held the property. It was agreed that the questions raised should be submitted to the court, and that such judgment be rendered as the court may order, or, if either party should elect, after the opinion is given, a jury trial should be had.

Westgate and Morse, and H. and G. A. Bingham, for the plaintiff.

Carpenter and Hibbard, for the defendant.

By Court, **SARGENT, J.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against being deprived of life,

liberty, or property without due process of law, is secured by the fourth and fifth amendments to the constitution of the United States, and by articles 15 and 19, bill of rights, New Hampshire constitution.

But in the administration of criminal law, searches and seizures often become not only reasonable, but highly proper and necessary. The duty of officers under search-warrants for specific property in specified places is well settled: 1 Chitty's Crim. Law, 57, 58; *Commonwealth v. Erwin*, 1 Allen, 587; *Holley v. Mix*, 3 Wend. 350 [20 Am. Dec. 702]. Our statute provides that "any officer who shall find any implement, article, or thing, kept, used, or designed to be used in violation of law, or in the commission of any offense, in the possession of or belonging to any person arrested or liable to be arrested for such offense or violation of law, shall bring such implement, article, or thing before the justice or court having jurisdiction off the offense, who shall make such order respecting their custody or destruction as justice may require."

And we think that an officer would also be justified in taking from a person whom he had arrested for crime any deadly weapon he might find upon him, such as a revolver, a dirk, a knife, or sword-cane, a slung-shot, or a club, though it had not been used or intended to be used in the commission of the offense for which the prisoner had been arrested, and even though no threats of violence towards the officer had been made. A due regard for his own safety on the part of the officer, and also for the public safety, would justify a sufficient search to ascertain if such weapons were carried about the person of the prisoner, or were in his possession, and if found, to seize and hold them until the prisoner should be discharged, or until they could be otherwise properly disposed of: *Spalding v. Preston*, 21 Vt. 9, 16 [50 Am. Dec. 68].

So we think it might be with money or other articles of value found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools, or implements, or weapons with which to effect his escape. We think the officer arresting a man for crime, not only may but frequently should make such searches and seizures; that in many cases they may be reasonable and proper, and courts would hold him harmless for so doing when he acts in good faith, and from a regard to his own or the public safety or the security of his prisoner.

It must, we think, in a case like this, be a question of fact

for the jury, whether the taking of the property from the prisoner were *bona fide*, for any purpose indicated above as reasonable and proper, and of course justifiable, or whether it were *mala fide*, unreasonable, and for an improper and unjustifiable purpose.

It seems to be now well settled, though it was long held the other way, that where an officer unlawfully gets possession of a debtor's property, as by breaking into his dwelling-house without proper authority, and then attaches it on mesne process, or levies upon it on execution, the attachment or levy will be void: *Ilseley v. Nichols*, 12 Pick. 270 [22 Am. Dec. 425]; *People v. Hubbard*, 24 Wend. 369 [35 Am. Dec. 628]; *Curtis v. Hubbard*, 4 Hill, 437 [40 Am. Dec. 292].

In the cases above cited, the officer broke into a dwelling-house to attach personal property on a writ in a civil cause. The breaking in that case was unlawful, and the possession of the property being thus unlawfully obtained, it was held that the attachment of the property was void, not that the property might not have been legally and properly attached on these writs, if the officer could have properly obtained possession of it without breaking the house. So in this case, the money and other articles were proper articles to attach, if the officer could rightfully obtain possession of them without arresting the debtor, which his writ did not warrant him in doing. Now, if the officer took advantage of his warrant, and the arrest under it, to take from his prisoner this property, not for any legitimate purpose, but simply for the purpose of attaching it on these writs, that would be obtaining possession of the property under false pretenses, and fraudulently, which would make the possession to stand like the unlawful possession in case of breaking into the house in the other case, and would not justify the attachment: *Woodworth v. Kissam*, 15 Johns. 186; *Murray v. Burling*, 10 Id. 172; *Allen v. Crofoot*, 5 Wend. 507; *Chapman v. Lathrop*, 6 Cow. 110 [16 Am. Dec. 433]; *Jones v. Root*, 6 Gray, 437.

If the jury shall find, or if it be conceded, that the defendant was justified in the first instance in taking this property from the prisoner under his warrant to arrest, then the subsequent attachment of the goods on the writs was well enough, and will be valid. But if it be found or conceded that the officer took this property from the prisoner for the purpose of converting it to his own use, or merely for the purpose of getting it into his possession, so that he might be able to attach

it on writs of other parties, which he then held, or was expecting to receive afterwards, then his possession would be fraudulent and unlawful, and the attachments might subsequently make in pursuance of such purpose would, we think, be void.

Plaintiff's counsel in argument take the position "that defendant could not lawfully do any act in reference to said property not required to secure the safe-keeping of the prisoner, except such acts as he would have been authorized to do if the property had actually remained upon the person of the prisoner." But this is plainly erroneous. There is nothing in the nature or character of the property in this case that is so peculiar that it enjoys any exemption from attachment. It is only because the property is upon the person of the debtor that prevents its being attached on any writ. It is a right or privilege that attaches to the person of the debtor, and not to the property, and as soon as the property is separated from the person of the debtor in any legal way, either by his own act or the act of another, this special exemption ceases, and the property may be attached like any other property.

That the defendant could not have appropriated this property to any use under the original warrant, or any authority conferred by it, is clear. He would then have been a trespasser *ab initio*, no doubt. The authorities on this point are numerous and unquestioned, but they have no application to this case, because here a new authority is conferred by law to do something which the original warrant did not authorize. If by virtue of one process he could seize the property, and take from the person of the prisoner, and hold it to secure his safe-keeping, that would be the extent of that authority. But while thus holding it under that authority, a new process comes into his hands, by which he is invested with a new authority, and is commanded to attach this property and hold it on this new process to satisfy the judgments that may be recovered in these suits. The property, if rightly taken from the person of the debtor, is now where it can be attached without interfering with the person of the debtor, or breaking into his house to obtain possession of it.

If this property had been separated from the person of the prisoner, or taken from his dwelling-house under authority of law, it is separated from his person and out of his house for all purposes. If this defendant rightfully and lawfully holds possession of the property in question, without having used

force or fraud to obtain it, then when a writ is put into his hands he may properly and lawfully attach it. But if the possession of the property was obtained by force or fraud, and hence was illegal, then the subsequent attachment will be illegal and void.

Again, suppose that this defendant had legally and properly taken this property from the person of the prisoner, and was simply holding it to prevent his escape, and while thus holding it in his possession another officer, who knew nothing of what had happened, should come with some writs against the prisoner, and finding this property in the defendant's hands, and learning that it belonged to the prisoner, he might attach it on his writs and hold it, the same as he might a yoke of oxen that belonged to the prisoner, which he might find in the hands of some third person. And why might not the defendant attach the property as well as another, if his possession was lawfully obtained?

If the defendant did nothing under his warrant except what his warrant justified him in doing, up to the time the writs came into his hands, and since then has done nothing except what his writs authorized him to do, he stands well enough; for in that case he has a sufficient justification for all his acts. He is not a trespasser *ab initio*, because he is not a trespasser at all.

What are the presumptions in the case as to whether the officer acted in good faith or in bad faith? and on whom is the burden of proof? There can, of course, be no presumption either way in such a case that shall be conclusive in law, not a *presumptio juris et de jure* that cannot be contradicted by any evidence. Nor would it, perhaps, be a presumption of law at all, not a *presumptio juris* even, which should hold the conduct of the officer to be right under all circumstances, till the contrary is affirmatively proved. But the acts of the officer in taking the property, with the kind of property taken, and all the attendant and subsequent circumstances of the seizure and of the attachment, are to be considered and weighed, and the question of good faith on the part of the officer is to be settled and decided upon the preponderance of the evidence, when there is any such preponderance. But in case of the equal balancing of the testimony, where there was no preponderance either way, or in the absence of all evidence upon the question, there can, we think, be no hardship in holding that the presumption is in favor of the officer. This would be

what is sometimes termed a presumption of fact, a *presumptio hominis*, or *presumptio judicis*, in contradistinction to a presumption of law: Jacob's Law Dic., tit. Presumptio; 3 Bouv. Inst., secs. 3064-3068; 1 Greenl. Ev., secs. 14, 44, et seq.; 1 Phillips's Ev. 155 et seq., and notes. But the distinction between this last and the *presumptio juris*, before spoken of, is not very clearly marked or well defined by the authorities.

As in case of an instrument in writing, in which there has been some material alteration, it is held in this state that there is no presumption of law, either conclusive or not conclusive, that the alteration was made after the execution of the instrument so as to exclude the instrument as evidence, either conclusively or until some explanation is given of the alteration, *aliunde*. But the instrument is allowed to be given in evidence in the first instance, notwithstanding the alteration is apparent, and the jury are instructed that they are to consider the instrument itself in connection with all the other evidence in the case, and decide upon the preponderance of evidence when the alteration was made. But if there is an entire absence of evidence and of circumstances, either in the instrument itself or *aliunde*, from which the jury could find the time of the alteration, or if upon all the evidence there was no preponderance either way, then the presumption of fact arises that the alteration was made after the execution: *Cole v. Hills*, 44 N. H. 227, 235, and cases cited.

So in this case we think the facts should all be submitted to the jury, and they should find, upon a preponderance of all the testimony, whether the seizure in this way or any other case was made *bona fide* or *mala fide*. But if there was no evidence in the case from which that question can be settled, or, if after hearing all the evidence that may be introduced, the jury should find the scales to hang in even balance, the presumption should be held to be, and the jury should be instructed, that they are to presume that the seizure was made *bona fide*. We think this due to the cause of justice, and to the protection of the officers of justice, who may be often called on to act promptly and without legal advice, in cases of doubt and uncertainty, and where the interests and safety of the public are most deeply involved.

The circumstances in nearly every case would be the most material evidence, and should all be submitted to the jury in the first instance, without any legal presumptions being made either way; but if the jury, upon the evidence, are unable to

decide the case, they should assume as a presumption of fact that the acts of the officer were right, upon the same principle that officers acting under oath are presumed to have done their duty till the contrary is proved: *Hills v. Colvin*, 14 Johns. 132, and cases cited; *Gilman v. Holt*, 4 Pick. 258; *Cross v. Brown*, 41 N. H. 283, 288; *Shackford v. Newington*, 46 Id. 415, 420; Co. Lit. 232 b.

LEVY EFFECTED BY UNLAWFUL OR FRAUDULENT MEANS. — An attachment or execution levy effected by unlawful or fraudulent means is illegal and void: *Drake on Attachment*, 6th ed., sec. 193; 1 *Wade on Attachment*, sec. 130; *Freeman on Executions*, sec. 256; as by forcing or opening the outer door of a dwelling: *Isley v. Nichols*, 12 Pick. 270; S. C., 22 Am. Dec. 425; *People v. Hubbard*, 24 Wend. 369; S. C., 35 Am. Dec. 628; *Curtis v. Hubbard*, 4 Hill, 437; S. C., 40 Am. Dec. 292, affirming 1 Hill, 336; *Bailey v. Wright*, 39 Mich. 96; and see *Regan v. Shilcock*, 7 Ex. 72; *Hooper v. Lane*, 6 H. L. Cas. 443; although early English *dicta* supported the distinction that while a sheriff having a *fi. fa.* would be a trespasser in breaking the outer door of the debtor's house, the levy would be lawful: Id. Taking the property by force from the person of the debtor renders the levy void: *Mack v. Parks*, 8 Gray, 517. And where property is fraudulently or forcibly removed or procured to be removed by a creditor from one state into another for the purpose of attaching it, the attachment will not be permitted to stand: *Timmons v. Garrison*, 4 Humph. 148; *Deyo v. Jennison*, 10 Allen, 410; *Powell v. McKee*, 4 La. Ann. 108; *Paradise v. Farmers' and Merchants' Bank*, 5 Id. 710; *Wingate v. Wheat*, 6 Id. 238, 241; *Myers v. Myers*, 8 Id. 369; S. C., 58 Am. Dec. 689; so the levy is illegal and void where a sheriff in a county in which he was not an officer took property under pretense of having a writ, and carried it into another county: *Pomroy v. Parmlee*, 9 Iowa, 328; S. C., 74 Am. Dec. 328; and where, on the suggestion of counsel for the attachment plaintiff, a trunk was procured and opened under cover and pretense of a criminal examination then progressing, but really for the purpose of levying an attachment upon money contained therein: Id.; so where the officer waited until the plaintiff's agent enticed the defendant out of the state, and neglected to make service of the writ, although he had a full opportunity for so doing, and then attached the defendant's real estate "for want of his body, goods, and chattels": *Nason v. Esten*, 2 R. I. 337; and where a federal court was resorted to on a false allegation of citizenship of the parties in order to obtain possession by attachment of property in a distant part of the state, and the plaintiff then dismissed the suit and brought another attachment suit in a state court: *Gilbert v. Hollinger*, 14 La. Ann. 441.

PRESUMPTION IS, THAT ACTS OF PUBLIC OFFICERS ARE IN ACCORDANCE WITH LAW: *Commonwealth ex rel. Bowman v. Slifer*, 64 Am. Dec. 680, and note collecting prior cases; note to *Wood v. Chapin*, 67 Id. 73.

HIBBARD v. EASTMAN.

[47 NEW HAMPSHIRE, 507.]

EQUITY WILL ENJOIN ENFORCEMENT OF JUDGMENT, if any fact exists which clearly shows it to be against conscience to execute the judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence on his part.

AGREEMENT TO DISCHARGE DEBTOR ON RECEIVING CERTAIN NOTE WITHIN CERTAIN TIME IS TO BE REGARDED AS TAKING EFFECT upon the delivery of the note, and not as a promise to give a discharge at a future time.

EQUITY WILL ENJOIN ENFORCEMENT OF JUDGMENT, where the holder of notes, who had brought suit thereon against the maker, agreed that he would discharge the maker from personal liability on receiving, within a certain time, the note of a third person, retaining, however, his security by mortgage, and the note was duly delivered, but the holder prosecuted the suit, obtained judgment, and was about to enforce it. Such agreement is not a release, but must stand upon the footing of an agreement not to sue, nor to prosecute the suit already commenced, and therefore could not be availed of as a defense to the suit.

BILL in equity by Elisha Hibbard against William Eastman and George Morrison. The hearing was upon a demurrer to the bill. The pleadings are sufficiently stated in the opinion.

Chapman and Felton, for the plaintiff.

Hibbard, for the defendants.

By Court, **BELLOWS, J.** The substance of the statements in the bill is, that the defendant Eastman having, on the fifteenth day of February, 1866, brought a suit against the complainant upon his three promissory notes of fifty dollars each, secured by a mortgage of a tract of land, the parties met on the next day and made an agreement, which was reduced to writing and signed by said Eastman, by which he agreed that if the complainant should, between that time and the next Monday night, bring him George W. Mann's note for eighty-five dollars, payable in six months, he would discharge the complainant from any further liability on account of said notes, the said Eastman still to hold his claim upon the mortgage.

That accordingly, on the next Monday morning, the complainant delivered to the said Hibbard the note of said Mann for eighty-five dollars, duly stamped, in full compliance with the terms of said agreement; and that the said eighty-five-dollar note has never been returned or offered to the complainant; and yet the said Eastman, regardless of his agree-

ment and discharge, entered his said action at the March term of the supreme judicial court in the county of Grafton, and at the September term obtained judgment therein, the said Hibbard being advised and made to believe that he had in law no defense, because his said agreement and discharge was not in law a full accord and satisfaction of said notes, nor a payment thereof.

That, contrary to equity, the said Eastman has caused execution upon said judgment to be issued for \$299.73 damages, and \$18.06 costs of suit, and has committed it to said Morrison for levy and collection; and the said Morrison has seized upon it the complainant's personal property, and advertised it for sale to satisfy that execution.

Wherefore the complainant prays for a perpetual injunction to restrain the collection and enforcement of said judgment, and for general relief.

The demurrer assigns for cause that complainant has an adequate remedy at law, and might have set up the matter alleged as a defense to said Eastman's suit, of which the complainant had due notice; and no other cause has been assigned at the hearing.

The question then is, What is the case stated in the plaintiff's bill, and has he, or had he, an adequate remedy at law? Could he have set up the facts alleged in defense to the suit at law? and ought he to have done so?

The substance of the case stated is, that after this defendant, Eastman, had brought his suit at law, he agreed to discharge this plaintiff from his personal liability on the notes sued, retaining his security by the mortgage; but that, in violation of this agreement, he prosecuted his suit at law, obtained judgment, and is attempting to enforce it by execution.

The general principles which govern cases of this sort are well settled. There is no doubt that courts of equity may, and often do, interpose to stay proceedings at law while pending, to stay judgment after a verdict, and to stay execution after a judgment; or, if execution has taken place, to stay the money in the hands of the sheriff; and it is laid down as a general rule which governs the exercise of these powers, that whenever a party, by fraud, accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, a court of equity, to prevent a manifest wrong, will interpose by restraining the party whose conscience is thus bound from using

the advantage he has improperly gained: 1 Madd. Ch. 131, 132, citing Redesdale's Ch. Pl. 103.

In *Marine Insurance Company v. Hodgdon*, 7 Cranch, 332, Marshall, C. J., lays down this doctrine: "That without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. . . . On the other hand, it may, with equal safety, be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have prevailed."

This doctrine is fully sustained by Chancellor Kent in *Duncan v. Lyon*, 3 Johns. Ch. 356 [8 Am. Dec. 513], where he says, "a party will not be aided after a trial at law, unless he can impeach the justice of the verdict by facts or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part."

In *Foster v. Wood*, 6 Johns. Ch. 90, it is held that equity will not relieve against a judgment at law, because it is contrary to equity, unless the party was ignorant of the fact relied upon while the suit was pending, or it could not be used as a defense at law; or unless he was prevented from setting it up by fraud or accident, or the act of the opposite party, unmixed with fault or negligence on his part. So, in *Lansing v. Eddy*, 1 Id. 49; *Smith v. Lowry*, 1 Id. 320; and *Dodge v. Strong*, 2 Id. 228.

If a party has not used due diligence in setting up such defense at law, relief will ordinarily be refused in equity: *Barker v. Elkins*, 1 Johns. Ch. 465; *Titcomb v. Potter*, 11 Me. 225; 1 Madd. Ch. 130, and notes.

The authorities illustrating these doctrines are very numerous. In 2 Story's Eq. Jur., sec. 879, it is laid down that if a judgment is obtained at law because the defendant cannot find a release which he has, but he afterwards finds it, a court of equity will grant a perpetual injunction.

So it is held in *Gainsborough v. Gifford*, 2 P. Wms. 424. So if a judgment is obtained by fraud for a larger sum than is due, upon a mutual understanding that certain set-offs should be allowed, equity would enjoin the judgment to the extent of the set-offs; and so if a party was surprised at the trial by a claim of which he has no notice: 1 Story's Eq. Jur., sec. 880. So in a case of such surprise an injunction was granted in *Bell v. Cunningham*, 1 Sum. 89; 1 U. S. Eq. Dig., sec. 139.

In *Briggs v. Law*, 4 Johns. Ch. 22, it was held that where, in giving a judgment bond, it was agreed that the creditor should enforce it ratably, but the creditor took out execution against a part only, equity would enforce the agreement by injunction.

In *Miller v. McCarr*, 6 Paige, 451, an injunction was granted to restrain the enforcing of a judgment against a surety upon the ground that he had been discharged by giving time to the principal, it appears that the surety could not set up this defense at law, because the facts were known only to the parties, and therefore could not be proved.

So equity will restrain the enforcing of a judgment that has been satisfied: 2 Story's Eq. Jur., sec. 875. So equity will restrain the enforcing of a judgment against a school district, obtained upon default for the wages of a school-master who has not the necessary certificate, the application being by taxpayers, and the court holding that they were not bound by the judgment, which might be regarded as collusive: *Barr v. Dinsmore*, 19 N. H. 170.

So where judgments are obtained by fraud, equity will interpose: *Bellows v. Stone*, 14 N. H. 203. So equity will restrain the enforcing of an award obtained by fraud: *Rand v. Redington*, 13 Id. 73.

In the case before us, if the agreement is not to be regarded as taking effect at once on the complainant's furnishing Mann's note as a discharge of his personal liability, but merely as a promise to give such discharge at a future time, the bill will lie for a specific performance.

If it is to be regarded as a present discharge, or agreement not to prosecute when Mann's note was delivered, then other questions arise. The terms are, that on delivering Mann's note at a time named, "I agree to discharge said Hibbard," etc., and although they might bear the construction that a discharge was to be given at a future time, yet, taking all the

circumstances into consideration, we think it is to be understood as a discharge from the delivery and acceptance of the note. This construction is fully warranted by the cases of *Gibbons v. Vouillon*, 8 Com. B. 483, and *Tuckerman v. Newhall*, 17 Mass. 581. In this last case, although the language was in the future tense, that he would discharge and release, yet it was held that it would operate as a present release, because it was manifest from the whole instrument that such was the intent, the court holding that if a man covenant that he will release a right, it ought to take effect immediately as a release, unless there are words showing a different intention.

The question, then, arises, whether this agreement could have been used to defeat the action at law. If it is to be construed as a release of the debt, it might have been so used; but it is apparent that such was not the intention. The security by way of the mortgage was still to be retained, and for that purpose the debt must be upheld; the personal liability only of the complainant was to be discharged. It must stand, therefore, upon the footing of an agreement not to sue, nor to prosecute the suit already commenced. This agreement could have been enforced in equity by an injunction against the prosecution of the suit at law; but it could not have been pleaded in bar of the future maintenance of that suit, for, as we have seen, the debt was not released.

In the case of *Parker v. Holmes*, 4 N. H. 97, which was much like this in substance, it was held that the agreement, even if under seal, could not be regarded as a release, for that would be a discharge of the mortgage, nor could it be regarded as a release of the right to sue without discharging the debt, and the remedy must be on the contract. The court likened it to a covenant not to sue, but said that such a covenant is not a bar, except when it can be considered a release, and that it could not be so considered when it is a covenant not to sue one of several promisors; and the court said that if there had been a contract between plaintiff and defendant, under seal, that plaintiff should look only to the mortgage, it would not have been a defense to this suit; so the remedy must have been on the contract.

So in the case of *Jackson v. Stackhouse*, 1 Cow. 122 [13 Am. Dec. 514], where there was indorsed upon a bond, and signed by the obligee, a release and discharge of the obligor from all liability on the bond, engaging to rely solely on the mortgage given with the bond, as security for the payment of the money,

it was held that this could be regarded only as a covenant not to sue the obligor.

The construction we give to this agreement is fully warranted by the construction given to covenants not to sue, which are ordinarily regarded as releases, when there is only one debtor, but not when given to one of several debtors with no purpose to release the others: *Parker v. Holmes*, 4 N. H. 98, before cited; *Durrell v. Wendell*, 8 Id. 369; and so it is, even when strong terms of release are used, if, from the whole instrument, the purpose can be gathered of retaining the claim against some of the promisors: 1 Parsons on Contracts, 28, and cases cited. *Couch v. Mills*, 21 Wend. 424, is a strong case of this character.

The same principle must require a similar construction where the creditor retains the security afforded by the mortgage, intending to discharge the personal liability of the debtor; and so is *Parker v. Holmes*, and *Gibbons v. Vouillon*, 8 Com. B. 483, before cited.

The reasonable construction to be given to this instrument is, that it is an agreement not to sue the complainant, or to prosecute the suit already commenced; and we are of the opinion, as before suggested, that the complainant could not have availed himself of the agreement as a defense to the suit at law, simply for the reason that it could not be pleaded as a release, for it was not a release, and in no other mode known to the rules of pleading could it be available at law as a defense to that suit.

Such is the doctrine of *Parker v. Holmes*, before cited, and also of *Dow v. Tuttle*, 4 Mass. 414 [3 Am. Dec. 226], when, at the giving of a note, it was verbally agreed that the payee should not sue it for a specified time, but it was sued before that time, the court, *per* Parsons, C. J., held this agreement to be no defense; that if valid at all, it must be regarded as collateral to the note; though in equity it would afford good ground for an injunction. A similar doctrine was held in *Carey v. Bancroft*, 14 Pick. 315 [25 Am. Dec. 393], where there was an agreement that a certain claim should be allowed to set off. It was decided that this was like an agreement not to sue, executory and collateral, and not affecting the terms of the note till executed.

It appears from the bill that, notwithstanding the agreement of the defendant Eastman not to sue the complainant, nor prosecute the suit already commenced, he did prosecute

it, and obtained a judgment for the whole amount of the notes, and is now seeking to enforce it. If he did this after accepting the Mann note under the agreement, and without the consent of the complainant, it is manifestly against conscience that he should use the advantage thus gained, and equity ought to interpose to prevent it.

This is substantially that complainant's case, although in some respects imperfectly stated; yet as the only ground of demurrer taken is, that there was an adequate remedy at law, we have not been called upon to consider whether the plaintiff's case has not in some particulars been argumentatively and defectively stated, so as to require amendment. His case is substantially what is stated above, and upon that he had no adequate remedy at law; and as it now appears from the bill, the prosecution of the suit to final judgment, with the intent to enforce it against the complainant personally, contrary to said Eastman's express agreement not to do so, was manifestly against conscience, and calls for the interposition of this court.

Upon further proceedings, it may appear that there was such an assent or acquiescence in this proceeding of the defendant as to raise the question whether this application is not too late, even although the agreement could not have been set up as a defense at law. Upon the case stated, however, as we understand it, we think the demurrer must be overruled, and respondent must answer further.

EQUITY WILL ENJOIN ENFORCEMENT OF JUDGMENT obtained by fraud, accident, surprise, or mistake: See *Gregory v. Ford*, 73 Am. Dec. 639; *Litchfield's Appeal*, 73 Id. 662; *Bridgeport Savings Bank v. Eldridge*, 73 Id. 688, and the notes thereto.

THE PRINCIPAL CASE IS CITED in *Nealis v. Dicks*, 72 Ind. 380, to the point that a judgment obtained in violation of an agreement of compromise, and by which an appearance is prevented, will not be allowed to stand.

BURNSIDE v. GRAND TRUNK RAILWAY COMPANY.

[47 NEW HAMPSHIRE, 554.]

DECLARATIONS OF AGENT WHILE IN EXECUTION OF ACT WITHIN SCOPE OF HIS AUTHORITY are admissible against the principal.

DECLARATIONS OF GENERAL FREIGHT AGENT OF RAILROAD COMPANY concerning goods delivered to him for transportation are admissible against the company, when made while the goods are in transit and the carrier's duty still continues, although made eight months after the goods were so delivered to him.

OBVIOUS PURPOSE OF PLEADER TO ALLEGE SPECIAL DAMAGES WILL NOT BE CONTROLLED by the mere fact that he commenced the allegations as though they were new counts.

OBJECTION THAT SPECIAL DAMAGES SHOULD NOT HAVE BEEN CONSIDERED BY JURY, even if properly alleged, cannot be urged on a motion for a new trial if the party's exception as to the admission of evidence of special damages was solely on the ground that they were not alleged in the declaration, and no instructions on the point were asked.

CASE against the railroad company as a common carrier to recover damages for a delay in the transportation of a package of bags. According to the declaration and the testimony of the plaintiff, the plaintiff, about August 1, 1862, delivered to one Cummings, the defendant's general freight agent at Northumberland, New Hampshire, a package containing two hundred bags, to be transported to Horton and Fowler, Milwaukee, Wisconsin, for the purpose of being filled with corn and then returned to the plaintiff. The plaintiff, not having heard from the bags, applied for information, in April, 1863, to Cummings, who was still the defendant's general freight agent at Northumberland, and was told by Cummings that he had ascertained that the bags were at Sarnia, at the defendant's freight depot, under a large lot of flour. The defendant objected to this statement of Cummings, on the ground that it was not within the scope of his agency, and could not bind the defendant; but the court admitted it. The defendant also objected to evidence of special damages, on the ground that they were not alleged in the declaration; but the court held otherwise. The jury were instructed that the plaintiff could recover his actual damages caused by the failure of the defendant to carry and deliver the bags in ordinary and proper time for such transportation, although he did not pay the freight in advance, if the defendant received the bags and undertook to carry them with the understanding that all freight was to be paid on their return. There was a verdict for the plaintiff, which the defendant moved to set aside. The defendant also

moved in arrest of judgment, on the ground that the plaintiff's declaration was insufficient.

Benton and Benton, for the plaintiff.

Fletcher and Heywood, for the defendant.

By Court, BELLOWS, J. The first question is, whether the statement of Cummings, the defendant's general freight agent, was rightly admitted in evidence. On this point, the plaintiff's testimony was, that he delivered the bags to him at Northumberland, about the 1st of August, 1862, to be carried to Milwaukee, and that, not having been heard from, in April, 1863, he applied to Cummings, who still continued to be such agent, for information about them, and was told by him that he had ascertained that they were at Sarnia, at a freight depot, under a large lot of flour.

In the solution of this question, the only difficulty arises from the fact that this statement was made after the lapse of about eight months from the time the bags were received by defendant. Had the statement been made at the expiration of a reasonable time for the delivery of the bags at Milwaukee, and the transmission of the intelligence to plaintiff of their non-delivery, it would have been admissible in evidence as being within the scope of Cummings's agency, and while it continued in relation to this very transaction, *dum fervet opus*.

In *Morse v. Connecticut River R. R. Co.*, 6 Gray, 450, it was decided that the statements of the conductor or baggage-master and station-master, in relation to the loss of a trunk on a railroad, made to the owner upon inquiries by him on the morning after the loss, were admissible upon the ground that such statements were made by them, as agents of the defendants, within the scope of their agency, and while it continued. The verdict was set aside for error in excluding this evidence.

In *Burgess v. Wareham*, 7 Gray, 345, it was decided that the declarations of a highway surveyor in relation to work done upon a highway, under a contract made with him, such declarations being made several months after the work was finished, were not admissible. The doctrine of that case was, that the statements of an agent in negotiating a contract and carrying it into execution, are regarded as part of the *res gestæ*, and admissible in evidence, but that after such contract has been executed, his statements are merely hearsay and like those of any other person, and cannot affect his principal.

This is the doctrine of *Demerit v. Meserve*, 39 N. H. 521, which holds that, to make the declarations of an agent admissible, they must be within the scope of his authority, and made while the transaction is depending. Such is the doctrine laid down in 1 Greenl. Ev., sec. 113, and cases cited; and Story on Agency, sec. 137, and notes; and *Fairlee v. Hastings*, 10 Ves. 123, and notes.

In the case before us the transaction was still depending, the goods were still in transit, and it was still within the scope of Cummings's authority to find and forward them. Had the plaintiff before this in any way put an end to the defendants' duty to transport any farther those bags or to deliver them to him, the case might have been different perhaps, but nothing of that kind is stated; and for aught that appears, the original undertaking by the defendants to carry the bags to Milwaukee still subsisted, and the agency of Cummings still continued in respect to it. So long as the duty of the defendants to transport the goods continued, the authority of the agent would continue, and so long his declarations in respect to it would be regarded as the declarations of the principal.

There are authorities which hold that the declarations of a general agent,—and Cummings must be regarded as such,—made at any time during his agency, are admissible against his principal: 2 Phillips on Ev., Cowen and Hill's Notes, 187; and such seems to have been the view of Tindal, C. J., in *Garth v. Howard*, 8 Bing. 451. But however this may be, we think it well settled that the declarations of the agent while in the execution of an act within the scope of his authority are admissible against the principal. In *Mott v. Kip*, 10 Johns. 478, it was decided that the declarations of a deputy sheriff to plaintiff's attorney, made in answer to inquiries relative to an execution in such deputy's hands, and while it was in force, were admissible, and the court put it upon the ground that the statements were made in the count of the transaction, and were to be considered as part of the act touching the execution of the writ.

The only question in the case before us is, whether, at the time these statements were made, the contract with the railroad was still in the course of execution; and for the reasons before suggested, we think it must be so considered.

It is true that, in November, previous to the time when the plaintiff applied to Cummings, which was in April, 1863, he

had purchased barrels to transport his corn in, but there was no evidence that he had given directions to defendant not to transport the bags to Milwaukee and in the absence of such evidence, it would be understood that the original contract to deliver the bags to Horton and Fowler, the plaintiff's agents, was still in force. Besides, it is quite clear that the duty of the railroad to find these bags and deliver them to the plaintiff at some place still existed, and that being the case, the agency of Cummings still continued.

The exception that the special damages claimed are not specially alleged in the declaration appears not to be true in point of fact. It is true, the declaration is informal, the statement of each item of special damage commencing as if it were a new count; but it is manifest that it was the purpose of the pleader to set them out as special damages, all constituting but one count. These allegations all assume that the cause of action is stated in the preceding part of the declaration, and do not undertake to set out the cause of action. Indeed, there is nothing to give these statements the character of separate counts but the commencement, and we do not think this ought to control the otherwise obvious purpose of the pleader.

As there was no other exception to the proof of special damages, it is too late now to urge that it ought not to have been considered by the jury.

The exception to that evidence was specific, that no such damages were alleged; and as that turns out to be unfounded, the evidence stands as if received without objection. The only inquiry then is, whether there was any error in the instructions to the jury of which the defendants can avail themselves. If there is any objection, it can only be that the court did not direct the jury that these special damages, or some of them, could not be included; but the answer to that is, that no such instructions were asked for, and what were given were correct.

The truth is, that by confining their objection to this evidence to the want of the necessary allegations in the declarations, the defendants waived all others, and as those allegations were in fact made, this testimony must be treated as received without objection. If, then, the defendants wished for instructions on this point, it was their duty to ask for them; as this was not done, it must be understood that the defendants acquiesced in the plaintiff's claim to include these items, if properly alleged in the writ, and the absence of instructions on that point is no cause for disturbing the verdict.

If by a general exception to the charge of the judge a party might take advantage of any omission to notice and give proper instructions upon all and every matter appearing in the cause, it would obviously encourage a practice that would cause great embarrassment to courts of justice, and one which finds no countenance in the adjudged cases. In our own state, it is decided that if instruction is desired upon any particular point, the party must ask for it, and cannot lie by and take his chance of a verdict, and then take exception: *Moore v. Ross*, 11 N. H. 557, and cases; and so in *State v. Haskell*, 6 Id. 359; the same views are recognized in *Armstrong v. Taber*, 11 Wheat. 277. In *Wait v. Maxwell*, 5 Pick. 219 [16 Am. Dec. 391], it was held that a verdict should not be disturbed because improper evidence was admitted, and even commented upon by the judge, if no objections were made at the trial, or different instructions asked for; the court holding that it must be considered that all objections are waived.

So in New York, in an action against a master for the negligence of his servant, it was held, on a motion for a new trial, that it could not be urged that the evidence did not establish the relation of master and servant, if the objection was not made at the trial: *Ford v. Monroe*, 20 Wend. 210. These decisions, we think, conform to the course of the practice in this state: *Jackson v. Barron*, 37 N. H. 494, and cases cited; and *Essex Bank v. Rix*, 10 Id. 201, and see cases; *Bank v. Keene*, 45 Me. 103 [miscited].

Judgment on the verdict.

DECLARATIONS OF AGENT, WHEN ADMISSIBLE AGAINST PRINCIPAL: See *Cobb v. Johnson*, 62 Am. Dec. 457, and note; *Burnham v. Ellis*, 63 Id. 625, and note; *Tuttle v. Brown*, 64 Id. 80, and note; *Dick v. Cooper*, 64 Id. 652; *Coweta Falls Mfg. Co. v. Rogers*, 65 Id. 602; *Fogg v. Pew*, 71 Id. 662; *Reed v. Vancleve*, 72 Id. 369; *Converse v. Blumrich*, 90 Id. 230; *Anthony v. Eastabrook*, 91 Id. 702. The principal case is referred to in *Deming v. Grand Trunk R. R.*, 48 N. H. 472, and *Toledo etc. R'y v. Owen*, 43 Ind. 409, on the power of freight agents of railroads to bind the companies by their acts and agreements; but see the principal case distinguished in *Packet Co. v. Clough*, 20 Wall. 541.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

WARD v. RUCKMAN.

[36 NEW YORK, 26.]

MASTER OF VESSEL WHO IS ALSO PART OWNER DOES NOT, BY VIRTUE THEREOF, have a special privilege called or known as a sailing or master's interest, which will prevent the owners of a majority interest in the vessel from displacing him as master at their pleasure.

ACTION for damages. The report of the case in the court below will be found in 34 Barb. 319. The opinion states the facts.

I. T. Williams, for the appellant.

G. Dean, for the respondent.

By Court, DAVIES, C. J. This is an action brought to recover damages against the defendant for depriving the plaintiff of the right claimed by him to sail and navigate, as captain, the schooner *Ney*. It appeared, upon the trial, that in January, 1856, the defendant and one William De Groot were the owners of said schooner, the defendant owning three fourths parts thereof, and said De Groot owning the remaining fourth part thereof; that De Groot at that time was the captain of said schooner, and had sailed her as such; that the defendant applied to the plaintiff to take charge of the schooner as such captain, to which the plaintiff replied that he would not sail the vessel without having an interest in her, for the reason that he should be liable to be turned out at any moment. The captain then informed him that he could purchase Captain De Groot's interest; and, on application to De Groot, he

agreed to take two thousand five hundred dollars for his one quarter. The plaintiff testified that when he bought this quarter, in January, 1856, the vessel was worth ten thousand dollars, exclusive of the master's interest. He also testified that there was nothing said between the defendant and himself as to how long he was to sail the vessel on shares, nor when the contract was to terminate; but witness supposed as long as they both kept her. The plaintiff put in evidence the bill of sale from De Groot to himself, from which it appeared that De Groot sold to him "one quarter of said schooner or vessel, together with one quarter of the masts, bowsprit, sails, boat, anchors, cables, and all other necessities thereunto appertaining or belonging." The enrollment of the vessel, set out in the bill of sale, recited the facts that the defendant owned three fourths of the schooner, and that De Groot owned one fourth, and that they were the sole owners of said vessel, and that De Groot was then the master thereof. It appeared upon the trial that various witnesses testified that when a master owned an interest in a sailing vessel, it was known and called the sailing interest. It was generally understood that when a captain buys a master's interest in a vessel, it is worth more than without such interest. That a master's or sailing interest is sometimes worth fifty per cent more than a citizen's interest; sometimes not worth more than from twenty-five to thirty per cent. The witnesses meant by this that the privilege of being captain of the vessel, which privilege they supposed inhered or attached to any share of a vessel, when owned by a captain, was worth a third more than a mere citizen's interest. Upon the plaintiff's resting his case, the defendant moved to dismiss the complaint on the ground that the action would not lie, it not appearing that the vessel had been sold or destroyed by the defendant. The plaintiff's counsel asked the court to submit the case to the jury, upon the question of damages, insisting,—

1. That the plaintiff owned a sailing or master's interest in the vessel, and that the defendant had wrongfully deprived him thereof.

2. That the plaintiff's interest in the vessel under the proof was an entirety, and that the defendant had no joint or interest in common with him in his quarter of the vessel, that being the sailing or master's interest,—the defendant owning no such interest in the remaining three quarters of the vessel.

3. That the plaintiff had owned the privilege of sailing the

vessel as captain and master thereof; and that having been deprived of the exercise of such privilege by the wrongful act of the defendant, he was entitled to damages or indemnity therefor.

4. That in any view of the case the plaintiff was entitled to recover a sum equal to the difference between the value of a sailing or master's interest in one fourth of said vessel and the value of a citizen's interest in such one fourth, if the jury should be of opinion upon the proof that any difference existed in the value of such respective interests.

The court overruled said questions and nonsuited the plaintiff, and gave judgment for the defendant, which, on appeal, was affirmed at the general term.

The foundation of the plaintiff's right of recovery depends upon his establishing his first proposition, viz., that the plaintiff owned a sailing or master's interest in the vessel. There are several conclusive reasons which forbid our assenting to the soundness of this claim.

1. It is not apparent that De Groot had any such interest himself. He did not claim any such interest, and did not assume to sell and convey any such interest to this plaintiff. The bill of sale, to which we must resort to ascertain what De Groot sold, and what the plaintiff purchased, makes no mention or reference to any such interest. It conveys only the one-quarter part of the schooner, her tackle and apparel; and the plaintiff himself says he only paid the value of one-quarter part of the schooner, viz., two thousand five hundred dollars, the whole being worth ten thousand dollars. He then neither paid anything for any such interest, and if De Groot possessed or owned any such interest, he did not assume to sell any such interest, and no such interest was sold and conveyed to this plaintiff. The plaintiff claims such interest by virtue of his purchase from De Groot, but the muniments of his title show that no such interest was sold, or assumed to be sold, to him.

2. I have looked in vain at all the authorities referred to, and text-books accessible to me, and in none do I find any such interest mentioned or referred to. I find no allusion to any such interest, or that a master who is a part owner of a vessel has any such interest which he can sell and dispose of. If a master has such an interest attached to his share in the vessel, then, if it be capable of sale and disposition by him, and goes with his share as appurtenant thereto, it follows that

he can, by a sale of his share, however small soever it be, appoint a master of the vessel, in hostility to the wishes of all the other owners, and greatly to their detriment. If the doctrine contended for be true, that a majority of the owners cannot change the captain or master at their pleasure, it would necessarily follow that a perpetual captain or master might have the control of the vessel in hostility to them.

But another serious difficulty will arise from the maintenance of this principle. If the share of one captain or master has attached to it, or inhering in it, this sailing interest, how will it be if several captains or masters become the owners of shares in the same vessel? Which, having this interest, is to take command, to the exclusion of the other? If it inheres or attaches to one, it must to all. And again, suppose that, in the present case, De Groot had subdivided his quarter into four parts, and sold a quarter part to four different captains or masters, which or would all have had a sailing interest? or would each have had a quarter part of a sailing interest? In either event, which would have been entitled to the command of the vessel, and which to have maintained an action against the other owners for not having the command awarded to them? These considerations would appear to demonstrate that no such intangible interest can exist in the ownership of a part or share of a vessel, and that the owners must necessarily own parts or shares of equal value, and with equal rights and privileges, and that it is utterly impracticable that a permanent right to command the ship should be attached to any particular share. This right certainly cannot spring from the circumstance that, at some point of time, a share in the vessel was owned by one who, at the same time, was the captain or master. It would not be competent for the owners of the other shares to consent or agree that a particular share should forever have the right to command the vessel, much less can that right arise when such owners do not consent.

Card v. Hope, 2 Barn. & C. 661, is a strong case in affirmance of this doctrine. Card and Carman, being the owners of nine sixteenth parts of the ship Herefordshire, entered into a covenant with one Hope, whereby they agreed to sell him two sixteenth parts of said ship, and that Hope should be appointed to the command of the ship, and that Card and Carman should continue to be the managing owners. It was further agreed that in case Hope, from ill health or other cause, should retire from the command, Card should be at

liberty to appoint his successor upon such terms as should be approved of by Hope or his executors, and in case Card should decline to appoint such successor, then Hope or his executors should be permitted to appoint in his stead a fit and proper person to command the ship, and that the person so appointed should be entitled to all the privileges which Hope by said covenant was entitled to in right of such command. Lord Tenterden, in delivering the opinion of the court, said: "It is impossible to read this deed without seeing that it is a bargain for the profit to be derived to the plaintiffs from the appointment of the defendant or his nominee to the command, the profit being either a greater price for the shares sold, or the continuance of the management or other powers and authorities in themselves, or partaking probably of both. And we are of the opinion that such a contract is void, as being contrary to the interests of the charterers and of the other owners." He further observed: "It is a part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration, the law enables a majority of the part owners (under guards, indeed, to the interest of the minority peculiar to itself) to employ their ships even against the will of the minority, that the ship may not remain unemployed. A power of employment vested in the majority seems to import a power of appointing officers, and in practice, the majority certainly exercise that power. But such a power carries with it a duty, the duty of exercising a free and impartial judgment in the choice of every person who is intrusted with the management of the outfit and with the navigation of the ship, *ut dentur digniori*, and any contract which is calculated to have the effect of fettering the judgment, and of binding the party to concur in his nomination of particular persons at the peril of an action, is a violation of duty. The violation of duty becomes greater and more odious, if the contract be founded on motives of peculiar gain and advantage to the contractors; all the part owners ought to share ratably in every profit that may be made of the ship, and if such contracts could be allowed by law, they must operate as a discouragement to persons to become owners of ships. The duty, however, is owing not only to the charterers and other part owners of a ship, but also to all whose life or property may be embarked by her. And consequently, a violation of the duty is not only to the charterers and part owners, but also to another most important object; namely,

the protection and safety of the lives and property embarked on the sea."

These observations of this eminent judge are very pertinent to the case now under consideration, for a right is claimed here which it was in that case held unlawful should exist and be exercised by contract. It cannot be successfully contended that this plaintiff possesses the right to command this schooner more securely than he would have done if it had been conferred by express contract. To illustrate: suppose all the owners of this schooner had entered into a covenant with De Groot that he, as owner of his quarter-share, should have the command of the schooner, and that the same rights should be enjoyed by his assignee. This is certainly putting the plaintiff's claim in the strongest and most favorable light for him. Yet, we see, such an arrangement must be condemned, for reasons and considerations which are unanswerable and imperative. I think the learned counsel is mistaken in the supposition that there is any interest known in the law as a sailing interest arising from the fact that the ownership of a share in a vessel and the command thereof are united in the same person. My researches have not enabled me to find a case where any such interest has been recognized, and protected and enforced. Much less can I find that in any instance has such interest been the subject of sale and transfer, and the vendee held, by virtue of such purchase, entitled to the command of the vessel, in opposition to the wishes of a majority in interest of the owners. If this claim be sound, then, it follows logically that any one purchasing a master's sailing interest (if such a thing has an existence) becomes thereby *ipso facto* master of the ship or vessel, and has a vested right to take the command of her; and this result would obtain, how small soever be the share to which this right inhered or attached. Such a right necessarily deprives all the other owners of any voice or control in the management of their property, and subjects it to the casualty of falling into the hands of the most untrustworthy and irresponsible. A person might, by the purchase of an insignificant share or interest in a vessel, assume the command thereof in hostility to the wishes of all the other owners. If the purchase of a share in a vessel possessing this right vests in the vendee the right to command the ship, as is contended in the case at bar, then, as the master cannot be divested of that right, and deprived of the command by a majority of the owners, as is also

contended for, and cannot be removed by a court of admiralty, except on payment to him of the value thereof or the damages which he may sustain by deprivation of the command, it is easy to see that few, if any, will be tempted to embark their property in enterprises over which they can have no control, and which will be subject to such grave embarrassments.

The theory of the learned counsel for the plaintiff takes its origin in an assumption not warranted by the text-writers and the authorities, viz., that as a master who is part owner of a vessel cannot be deprived of the command by a majority in interest of the owners, he has a sailing or master's interest, arising from such ownership, of value, and of which he cannot be divested without his consent. It is seen that if the majority of owners can change the command of the vessel at their pleasure, then such an interest is a myth.

A very careful examination of all the authorities within my reach has satisfied me that the true rule is, that in all cases the majority in interest of the owners have the right to control the vessel in every particular. And if so, it conclusively follows that no such interest exists as a master's or sailing interest. Story on Partnerships, sec. 432, says: "The common law not only thus gives to the majority in interest of the part owners the right and authority to employ the ship upon any proper voyage or adventure, but it also confers upon the majority the right and authority in all cases to appoint the master and officers and crew of the ships, and to displace them at their pleasure, even although the master should be a part owner"; and such, he says, is also the rule of the French law, citing Boulay-Paty's *Droit Commerce*, tom. 1, tit. 3, sec. 5 p. 340. He proceeds to say that this authority must be exercised by a free and impartial judgment in the choice of the master and officers and crew, and especially in the choice of the master; and adds, "that any contract, therefore, made by some of the part owners only, which is calculated to have the effect of fettering their judgment, and of binding them to appoint or concur in the appointment of particular persons as masters and officers, is a violation of that duty." He refers with decided approbation to the opinion of Lord Tenterden, in *Card v. Hope*, 2 Barn. & C. 661, and says: "Such a contract is, therefore, utterly void, as against public policy and the true interest of commerce and navigation." Again, in section 445, Judge Story says: "We have already had occasion to state that the majority in interest of the part owners

have a right to appoint the master and officers of the ship. This right necessarily carries with it the right to displace and dispossess the master and other officers, when in authority or possession of the ship; and it will make no difference in this respect whether the master or other officer be a part owner or not." And he adds: "However, when a court of admiralty is called upon to enforce this right, although it allows the authority to displace and dispossess to be exercised at the sole pleasure of the majority, if the master or other officer is a mere stranger, yet if he is a part owner, the court commonly requires some reasonable ground to be stated therefor"; citing the case of *The New Draper*, 4 Rob. 287, etc.

A remark by Sir William Scott in this case, to the effect quoted, is the foundation of the doctrine now maintained, that the master when he is a part owner cannot be dispossessed by a majority of the owners in interest. That case will be hereafter adverted to. Flanders on Shipping, section 164, says: "The owners may dismiss their master at their pleasure"; and adds: "Upon a general retainer for no particular voyage, the master may be dismissed at any time without cause assigned, because the nature of his employment upon that condition is a mere agency, to be revoked at any time by the principal."

Mr. Curtis, in his valuable work on the rights and duties of merchant seamen, at page 164, cites this passage from the Code de Commerce: "That if the master dismissed is a part owner of the ship, he may renounce his interest and require the reimbursement of the capital which represents it." And Mr. Curtis adds: "From these evidences of the maritime law, it would seem that the owners have the right to remove the master who is a part owner at their own pleasure, paying him for his share of the vessel." And at page 165 Mr. Curtis says: "If he [the master] be removed without good cause, after an engagement for a particular voyage, I think they are bound to pay him damages for loss of employment as master, and for any loss or liabilities he may have incurred by reason of his employment." This qualification of the removal, after an engagement for a particular voyage, is significant, and shows that the breach of that engagement is the foundation of the claim for damages, not the fact of removal.

Boulay-Paty, in his work, *Droit de Commerce*, tom. 1, p. 332, says: "But as the majority (by article 220 of the Commercial Code) is determined by a portion of interest in the ship, ex-

ceeding the half of its value, if the master is part owner of more than a half, he cannot be dismissed, for if he was not the master, he would have the sole right to name one. Indeed, the master may own in the ship either a part equal to or a part which exceeds the half, or a portion less than one half. In the first case, his position is irrevocable, because a majority cannot vote against him. In the second, no person is able to dispossess him, as no one other than himself has a portion which exceeds one half of his interest. In the third case, the will of the other part owners can exclude him. Finally, as by the article 220 it is the will of the greatest number in interest which can decide, it is not necessary that there should be a unanimous vote to dismiss the captain; it is sufficient that it is the will of the majority."

In the Scottish Admiralty it is also held that ship-owners may dismiss the master at any time, without a cause assigned, and the majority may dismiss him in his character of master, even if he be a joint owner: Bell's Commentaries, 506, 508.

We will now proceed to the examination of the few cases where this question as to the power of removal of a master who is part owner has arisen and been adjudicated. In the case of *The See Reuter*, 1 Dod. 22, the admiralty court in England removed a master and part owner, in compliance with the decree of the burgomasters and counselors of the city of Rostock, in senate assembled, and in whom the admiralty jurisdiction of that city was vested, and which had directed the master to deliver up the ship. Sir W. Scott said: "In cases of ships belonging to British subjects, the court has no hesitation in ordering possession to be delivered up, on the application of a majority of the owners, without entering very minutely into the causes of dissatisfaction existing between them and the master." It is to be observed that this was said in a case pending for the removal of a master, who was also a part owner.

The case of *The Johan and Siegmund*, 1 Edw. Adm. 242, was a suit in admiralty, to change the possession of a foreign ship, on the application of fifteen sixteenths of the shares of the ship, against the master and owner of the remaining one-sixteenth part. Sir W. Scott refused to interfere, on the ground that the court had no jurisdiction in the case of a foreign ship. He observed: "If this were a British ship, there can be no doubt that by the practice of this court it would, upon the application of a majority of the parties interested, proceed to

dispossess the master, though a part owner, without minutely considering the merits or demerits of his conduct."

The case of *The New Draper* has already been referred to *ubi supra*. The suit was brought by the owners of nine sixteenths of a vessel against Walker, a part owner of seven sixteenths, and also master of the vessel, for his removal and a change of possession. Sir W. Scott, in giving judgment, said: "The dispossession of a master is, in its nature, not an uncommon proceeding; all that the court requires, in cases where the master is not a part owner, is, that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master and part owner something more is required, before the court will proceed to dispossess a person who is also a proprietor of the vessel, and whose possession, therefore, the common law is, upon general principles, inclined to maintain." The court said the case was the common one of the majority of owners proceeding against another, in which the common rule of this court must be pursued, and possession was decreed to the owners representing the seven-sixteenths part.

This case cannot therefore be rightfully cited as an authority that the majority in interest have not the power to displace a master who is a part owner, nor for the position that a court of admiralty will not, on the application of such majority, remove a master who is a part owner, and put him out of possession and place the possession with the other owners. On the contrary, it is believed that it is an authority for the affirmative of both these propositions.

Hopkinson, J., in the case of *Montgomery v. Wharton*, 2 Pet. Adm. 397, justly says: "And however hard it may seem that the master should be subject to the caprice of the owners as to his continuing in the command or not, he must consider it as one of the unavoidable inconveniences of his station, and in case of injury, apply to the laws of his country for redress; but much greater would the danger be to owners and to commerce in general if the appointment of a master should be irrevocable for the voyage. Whatever good opinion an owner may have of the master at the time of his appointment, he may find sufficient reason afterwards to change his mind, and not be able to produce any legal proof of defection or inability; and it would be an unreasonable hardship to compel an owner to continue what was originally a voluntary trust in the hands of a person of whom he has found subsequent reasons to be-

lieve that he may prove unfaithful or unskillful." This same case is reported in 1 Dall. 49, where the facts are stated to be, that the libelant, Captain Montgomery, was master and commander of the ship called the General Green, designed for a voyage to Martinico. While the ship lay in the river, a severe frost happened, which occasioned a great delay, and the owners thought proper to change their plans. Differences then arose, and they dismissed Captain Montgomery, and took the ship from him. The court says: "As to the dismissal of the captain, we are of the opinion that, upon a general retainer for no particular voyage, the captain may be dismissed at any time without cause assigned."

We deduce from these writers and these authorities this doctrine, that in all cases the majority in interest in the ownership of a vessel have the absolute right to employ whom they will as master, officers, and crew of the ship, and at their pleasure to displace them and employ others, whether the person so displaced be part owner or not; that in the single instance of a master employed for a particular voyage, if the master be displaced without cause, he is entitled to recover the damages which he may sustain by reason of such wrongful dismissal and breach of contract; that a court of admiralty, in a case like that presented in the record in this case, would have decreed the dismissal of this plaintiff as master, and delivered the possession of the schooner to this defendant.

It follows from these considerations that the plaintiff did not possess any interest called or known as a sailing or master's interest, and cannot therefore recover damages for being deprived of what he did not possess, and consequently could not lose. The complaint was properly dismissed, and the judgment thereon for defendant should be affirmed, with costs.

Judgment affirmed.

RIGHTS OF PART OWNERS OF VESSELS, GENERALLY: See note to *Donnell v. Walsh*, 88 Am. Dec. 364 et seq.

SHERIDAN v. BROOKLYN AND NEWTON R. R. Co.

[35 NEW YORK, 39.]

UPON MOTION FOR NONSUIT, WHERE EVIDENCE IS CONFLICTING, court should assume that view which is most favorable to the plaintiff.

RAILROAD COMPANY IS LIABLE IN DAMAGES FOR DEATH OF CHILD who, being seated in a crowded car, was compelled by the conductor to leave the seat and to stand upon the platform, from which, by the hasty and careless exit of another passenger, he was thrown and killed; and the wrongful act of such passenger would not relieve the company from the consequences of the wrongful act of their conductor in placing the deceased on the platform.

IN ACTION FOR DAMAGES FOR INJURIES CAUSING DEATH, REFUSAL TO CHARGE that "the fact that deceased was a child makes no difference in the application of the rule of law as to the question of negligence," and that "if he was not of years of discretion, he should have had a protector," is not error, if the court has charged generally that contributory negligence on the part of the child will bar recovery; but that if he was not negligent, and there was negligence on the part of the defendant, the plaintiff may recover.

ORDINARY CAPACITY AND ORDINARY CARE IN PROTECTING HIMSELF IS ALL THAT IS REQUIRED of a passenger in a railroad car.

SICK OR AGED PERSON OR CHILD IS ENTITLED TO MORE CARE from a carrier than one in good health and under no disability.

ACTION by the administrator of Sheridan, deceased, to recover damages for the wrongful acts of defendant, resulting in the death of said deceased. The opinion states the facts.

A. J. Parker, for the appellants.

James Emott, for the respondent.

By Court, HUNT, J. This is an action by the administrator of a boy nine years of age, against the defendants, for causing the death of the boy by the negligence and misconduct of the defendants.

On the 15th of September, 1864, the deceased, having paid his fare, was seated, with a companion of his own age, in the interior of a car of the defendants. The car began to fill up with passengers, and the conductor ordered the boys to get up and make room for adult passengers. They went forward in the car and took other seats, and were again ordered up, and objecting to give up their seats, were "put out" of their places by the conductor.

The car had by this time become very full, "very crowded." The deceased was crowded and pushed by the passengers in the cars out on the front platform, which, as well as the inside of the car, was full of people.

While there, the car being in motion, there was a rush of another passenger to get off, and the deceased was thrown off the car, was run over, and received injuries from which he died. At the close of the evidence, the defendants moved for a nonsuit. The court denied the motion, and the defendants excepted.

There was a conflict of evidence, and the jury by their verdict adopted the view claimed by the plaintiff on the trial, and we are to take the same view on this appeal. It is this view which I have given above.

The defendants insist that the motion for a nonsuit should have been granted, urging that there was negligence on the part of the deceased, in occupying a position upon the platform, and that the defendants were no more responsible than if the boy had been shot with a revolver, or struck with a club, by a fellow-passenger. The question of the negligence of the deceased in remaining upon the platform was submitted to the jury under the instructions hereafter to be considered. For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants, and against his own remonstrance properly, so far as the defendants are concerned. If by the motion of the cars he had been thrown from this dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their cars, he had been pushed from his standing-place, the defendants would have been liable.

It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be that the young man was not justified in rushing through the crowd, and in aiding in throwing the deceased from the cars; but this does not relieve the defendants' wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendants' illegal conduct in overcrowding their car, and in placing the deceased upon the platform that produced the disastrous result. It is no justification for the defendants that another party, a stranger, was also in the wrong.

Upon the evidence, the jury would also have been justified in finding the defendants guilty of negligence, in that the car was not stopped when the strap was pulled for that purpose. On this branch of the case, as on the others, there was conflict-

ing evidence. There was testimony on which the jury might have found that the bell was rung twice before the young man reached the platform, and that the driver should have stopped the car. It is quite clear that if the car had been stopped, the accident could not have happened to the deceased in its full extent, as it appeared that he was run over by the rear trucks, and there received the injury which resulted in his death. On both branches of the case it was the duty of the court to leave the question of negligence to the jury, and there was no error in denying the motion for a nonsuit.

At the close of the evidence, the defendants' counsel requested the court to charge the following propositions:—

1. That the fact that the deceased was a child made no difference in the application of the rule of law as to the question of negligence. If not of years of discretion, he should have had a protector.

2. The evidence showing that the deceased was knocked off the car while it was in motion, and that none of the defendants' servants contributed to the act, the plaintiff could not recover in this action.

3. That the deceased was in fault in going on to the front platform; and although the defendants might have been guilty of negligence, yet where each party is guilty, there can be no recovery.

The court declined to charge otherwise than as set forth, to which defendants excepted. The second and third of these requests do not require much consideration; each of them is open to the objection of assuming as matter of fact what is not such, and what the jury found to be otherwise. Thus the second proposition assumes that none of the defendants' servants contributed to the deceased being knocked from the car, and the third assumes that the deceased was in fault in going upon the platform. The jury, however, found that it was the very act of the conductor in placing him on the platform that produced the result, and that he was not in fault in being there. If the second proposition was intended to be limited to the immediate act of throwing the deceased from the cars, it was not sound in any respect.

The defendants' counsel claims, more seriously, that there was error in refusing to charge the proposition first requested, to wit, "that the fact that the deceased was a child made no difference in the application of the rule of law as to the question of negligence; if not of years of discretion, he should

have had a protector." The question of negligence as here put forth, arises upon the conduct of the deceased in taking care of himself, and also upon the conduct of the defendants in regard to the deceased. In the latter view, the rule asked for would not have been correct. A sick or aged person, a delicate woman, a lame man, or a child is entitled to more attention and care from a railroad company than one in good health and under no disability; they are entitled to more time in which to get on and off the cars; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them. All these classes are entitled to use the streets and to ride in the cars; and such haste in starting up, or such speed in driving, as would be reasonable care toward others might well be carelessness and neglect toward them.

The proposition in question also embraces the degree of care necessary to be used by the deceased in respect to himself. It embraced too much in any aspect, when it requested a charge, as matter of law, that "if not of years of discretion, he should have had a protector." This would be a rule quite too rigid; there was no pretense that this boy was so young as to require a protector. The court did charge that if the jury were of opinion that the lad was negligent in any way, and his negligence contributed to the injury, the plaintiff could not recover; but if there was no negligence on the part of the boy, and there was on the part of the company, then he could recover. The rule of law was laid down generally, and the deceased, although a lad only, was required to conform to the standard; no exception or discrimination was made in favor of youth. It was not the province of the court to say whether what the boy actually did or omitted constituted negligence; that was for the jury exclusively. The court could only submit the general question of negligence to the jury, with instructions as to the law applicable to it.

No one, whether sick, lame, imbecile, or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready witted person could command. Ordinary capacity, and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence. For the general principles that I have laid down, see *Ernst v. Hudson River*

R. R. Co., 35 N. Y. 9 [90 Am. Dec. 761]; *Willis v. Long Island R. R. Co.*, 32 Barb. 398; S. C. affirmed in 34 N. Y. 670; *Beisiegel v. New York Central R. R. Co.*, 34 Id. 622 [90 Am. Dec. 741]. I think the case was correctly tried, and that the judgment below should be affirmed.

Judgment affirmed.

ON MOTION FOR NONSUIT, COURT WILL ASSUME TRUTH OF FACTS which plaintiff's evidence legitimately conduced to prove, notwithstanding there be a conflict in such evidence: *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 761.

NEGLIGENCE IS GENERALLY MIXED QUESTION OF LAW AND FACT, and should go to the jury under proper instructions from the court: *Baltimore and Ohio R. R. Co. v. Breinig*, 90 Am. Dec. 49, and note. When the evidence upon the question of negligence is conflicting, it should certainly be submitted to the jury: *Gonzales v. New York & H. R. R. Co.*, 6 Rob. 297, citing the principal case; and in such case, upon an appeal, their verdict will be deemed conclusive: *Van Schaick v. Third Avenue R. R. Co.*, 38 N. Y. 353, also citing the principal case.

ORDINARY CARE UNDER PECULIAR CIRCUMSTANCES OF PARTICULAR CASE is all that is required of an individual at any time: See *Loop v. Litchfield*, 42 N. Y. 360, citing the principal case; and see *Baltimore and Ohio R. R. Co. v. Breinig*, 90 Am. Dec. 49, and *Ernst v. Hudson River R. R. Co.*, 90 Id. 761, and note; and in the exercise of due care a party is authorized to assume that another will exercise an equal degree of care: *Gonzales v. New York & H. R. R. Co.*, 39 How. Pr. 420.

DOCTRINES OF NEGLIGENCE AS APPLIED TO CHILDREN OF TENDER YEARS and persons who are aged or infirm: See *Smith v. O'Connor*, 86 Am. Dec. 582, and note; *Baltimore and Ohio R. R. Co. v. Breinig*, 90 Id. 49, and note. To the point that more care should be exercised toward such persons than toward those who are in full vigor of limbs and senses, the principal case is cited and approved in *Gonzales v. New York Central R. R. Co.*, 39 How. Pr. 421; *Mentz v. Second Avenue R. R. Co.*, 3 Abb. App. 277. But this will not excuse the infant for doing what in an adult would be negligence, and the principal case does not so hold, say the court in *Solomon v. Central Park N. & E. P. R. R. Co.*, 1 Sweeny, 302. Because the party injured by negligence of another was an infant of tender years, it does not follow that contributory negligence barring recovery could be imputed to him merely for the reason that he had no protector: *Costello v. Syracuse etc. R. R. Co.*, 65 Barb. 100; *Thurber v. Harlem etc. R. R. Co.*, 60 N. Y. 335, citing the principal case.

PERSON RIDING ON RAILROAD CAR IN UNSAFE PLACE is not necessarily negligent if there is no safer place in the car where he may ride, and he rides in such place of danger at the invitation and with the consent of the persons in charge of the car: See *Clark v. Eighth Ave. R. R. Co.*, *post*, p. 495, and note, and *Ward v. Central Park R. R. Co.*, 1 Jones & S. 395; S. C., 42 How. Pr. 292, and 11 Abb. Pr., N. S., 414, the latter citing the principal case.

FOR INJURY OCCASIONED BY JOINT NEGLIGENCE OF SEVERAL, the party injured, if he was not himself in fault, may have his action against all or either of the persons causing the injury, and the negligence of the other is no excuse to the one sued: *Ring v. Cohoes*, 13 Hun, 88; *Robinson v. New York C. R. R. Co.*, 65 Barb. 155; *Chipman v. Palmer*, 9 Hun, 519; S. C., 77 N. Y. 54; *Webster v. Hudson R. R. R. Co.*, 38 N. Y. 262.

CLARK v. EIGHTH AVENUE RAILROAD COMPANY.

[36 NEW YORK, 185.]

PASSENGER RIDING ON STEPS OF PLATFORM OF RAILROAD CAR is in place of danger and *prima facie* negligent, and in an action for injuries by a collision, the burden is on him to rebut the presumption of negligence arising from such fact, which may be done by showing that the car and platform were full of passengers, with no room for more, and that the conductor stopped the cars to allow him to get on, and called for and received his fare, as this implied on the part of the defendant an invitation to ride in the place in which he did, and also an implied assurance that such place was a suitable and safe place to ride.

LAW REQUIRES OF COMMON CARRIERS OF PASSENGERS EXERCISE OF SUCH CARE on their part, and of their servants, as will insure the safe carriage of their passengers so far as their safety depends upon the diligence and care of those engaged in such carriage, and makes them responsible for any injury sustained from the omission of such care and diligence.

ACTION against a street car company for damages for injuries by a collision. The opinion states the facts.

A. J. Parker, for the respondent.

J. W. Ashmead, for the appellant.

By Court, GROVER, J. The defendant's counsel, at the close of the plaintiff's case, moved for a nonsuit, upon the grounds that the plaintiff had failed to show that the injury was received without negligence on his part contributing thereto; also that the evidence showed that his negligence did so contribute; and upon the further ground that the evidence failed to show any negligence in the defendant or its servants. The negligence alleged against the plaintiff was, that at the time of receiving the injury he was standing on the steps of the front platform of the car, it appearing that he would have escaped the injury had he been either inside of the car or upon the platform. In the absence of any explanation, I should have no hesitation in saying that this position of the plaintiff, at the time of the injury, proved that he was negligent, and that it would have been the duty of the court to nonsuit. When it appears that a passenger is riding upon a car, in a place of hazard or danger, his negligence is *prima facie* proved, and the *onus* is upon him to rebut the presumption.

The proof of the plaintiff in the present case tended to show that the inside of the car was full, and that the platform was full, so that no more persons could stand thereon; that in this situation the car was stopped for the plaintiff to get on; that upon his getting on, there was no place for him,

except standing on the steps; that while riding in this situation, the conductor called upon him for and received from him his fare. These facts, if true, authorized the jury to find that the plaintiff had been invited by those having charge of the car to ride in that place, and that an implied assurance had been by them given that that was a suitable, safe place for him to ride. Under such a state of facts, I do not think that negligence can fairly be imputed to the plaintiff for riding in that position. The motion, so far as based upon this ground, was properly denied.

The proof as to the defendant's negligence was, that there was a horse and cart on or near the track, the horse more or less unmanageable, in plain view of the driver of the car, who could have stopped his car in two feet, but did not stop, and continued to drive on toward the horse upon a trot until the horse started on towards the car and passed it, bringing either the horse or cart in collision with the plaintiff, knocking him from the car onto the pavement, thus producing the injury, the car not stopping until the driver was told that a man had been knocked off. I cannot say, as a question of law, that this was not negligence. The car must keep on the rails, and could not turn off, and thus get out of the way like a common vehicle. Thus situated, to drive up to the immediate vicinity of a fractious horse not controllable by its driver, attached to a cart, was certainly not so entirely free from danger as to justify a court in withdrawing its consideration from a jury. A minute's further time might have enabled the driver to regain control of the horse, and thus have avoided the injury. The motion for nonsuit was therefore properly denied.

The defendant gave evidence conflicting with that of the plaintiff as to stopping the cars and receiving the fare from the plaintiff, after which he renewed his motion for a nonsuit, and, upon its denial, excepted. As to this exception, it is only necessary to say that the legal question was not at all varied by the defendant's evidence; it only created a conflict of testimony which was proper to submit to the jury.

The court, among other things, charged the jury that the defendant and its servants were bound to use great care and caution in carrying the plaintiff, and if free from negligence himself, and injured from want of great care by the defendant or its servants, he was entitled to recover. The defendant excepted to this portion of the charge. This presents the question as to the degree of care a carrier of persons is bound

to exercise. The rule on this subject is so well settled that further discussion or the citation of authorities is deemed superfluous. The law requires from those so engaged the exercise of such care on their part and of their servants as will insure the safe carriage of their passengers, so far as their safety depends upon the diligence and care of those engaged in such carriage, and makes them responsible for any injury sustained from the omission of such care and diligence. It is not a legal error to call this great care, although the expression is not well calculated to convey to the mind of a jury an accurate idea of what care and diligence is required in the transportation of persons.

The charge that if the injury was the result of the combined negligence of the defendant and cartman, there being no fault in the plaintiff, he was entitled to recover, was not erroneous. If the negligence of the defendant contributed to the injury, it is no defense that the negligent act of another contributed thereto, if the injury would not have occurred but for the negligence of the defendant. The defendant, it is manifest, is only made responsible for the result of his own wrong; that wrong produced the injury, and although it would not have occurred but for the wrongful act of another, that circumstance furnishes no excuse for the defendant so far as an innocent injured party is concerned.

The court further charged, that if the plaintiff was permitted by defendant's agents to ride on the forward platform of the car (step meaning), he was guilty of no negligence in being there. To this portion of the charge the defendant's counsel excepted. Were not this portion of the charge modified by a subsequent portion, I think the exception was well taken. It is the duty of the passenger, on getting on board of a car, to place himself in a safe position therein, if he is able to obtain such position; and it is no excuse for him to place himself in an unsafe one, that the persons in charge know that he is unsafe, and do not drive him therefrom, when the unsafety is known to the passenger. That riding upon the steps of a street car is less safe than a seat inside, requires no proof; it is obviously so. In a subsequent portion of the charge, the judge told the jury that if the plaintiff made reasonable exertions to get inside of the car, and failed to do so, and was permitted by the driver and conductor to remain on the platform, he was not illegally there. I understand this portion of the charge as relating to the facts as claimed by the plaintiff;

that is, that the conductor assented to his riding there by receiving fare from him therefor, when it was impossible for him to get any other place. So understanding it, it gave a correct view of the law to the jury.

I have examined the other exceptions to the charge and refusals to charge, and come to the conclusion that none of them are well taken and require no discussion. The judgment appealed from should be affirmed.

Judgment affirmed.

BURDEN OF PROOF RESPECTING NEGLIGENCE WHEN PASSENGER IS INJURED: See the extended note to *Farish v. Reigle*, 62 Am. Dec. 679 et seq. Where a person is injured while riding in a dangerous position upon a railroad car, he is *prima facie* guilty of negligence which will bar recovery, and the burden is on him to show the injury was not the result of his negligence: See the note to *Ingalls v. Bills*, 43 Id. 366. The presumption of negligence from riding in a dangerous position may be rebutted by showing that the passenger rode in such position at the invitation of the persons in charge of the train, and for the reason that there was no safer place by reason of a crowd or otherwise where he might ride: *Ingalls v. Bills*, *supra*; and see the principal case cited to this effect in *Ward v. Central Park R. R. Co.*, 11 Abb. Pr., N. S., 413; S. C., 42 How. Pr. 291, and 1 Jones & S. 395; *Ginna v. Second Ave. R. R. Co.*, 8 Hun, 498; S. C., 67 N. Y. 597; *Maher v. Chicago etc. R. R. Co.*, 67 Id. 55; *Solomon v. Central Park R. R. Co.*, 1 Sweeny, 301; *Hadencamp v. Second Ave. R. R. Co.*, 1 Id. 498; *Barrett v. Third Ave. R. R. Co.*, 1 Id. 573.

DEGREE OF CARE REQUIRED OF COMMON CARRIER OF PASSENGERS: See *Johnson v. Winona etc. R. R. Co.*, 88 Am. Dec. 83, and note. To the point that they are bound to use the utmost care, see the principal case cited in *Barrett v. Third Ave. R. R. Co.*, 8 Abb. Pr., N. S., 211.

THE PRINCIPAL CASE IS CITED to the point that when evidence as to the fact of negligence is conflicting, it should be submitted to the jury: *Barrett v. Third Ave. R. R. Co.*, 1 Sweeny, 573; *Gonzales v. New York & H. R. R. Co.*, 6 Rob. 297.

SMITH v. BABCOCK.

[86 NEW YORK, 167.]

INSTANCES IN WHICH VENDEE MAY DENY VENDOR'S TITLE CONSIDERED.

TITLE OF VENDOR MAY BE DENIED IN ACTION BY HIM to recover damages for the removal by the defendants under the direction of the vendee, and while the premises were in the latter's possession under a contract of purchase, which was subsequently rescinded, of buildings which were standing upon said premises. The defendants, having made no contract with the vendor, are trespassers merely, so far as he is concerned, and the idea of estoppel or privies is inapplicable, and it is therefor, and for the reason that they are liable to the real owner only for an injury to the reversion, that they may show that the plaintiff is not such owner.

ACTION for damages for removal of a certain building from plaintiff's premises. The opinion states the facts.

G. B. Bradley, for the appellants.

George T. Spencer, for the respondent.

By Court, HUNT, J. This is a special action for injury to the plaintiff's interest in the property described in the complaint. The plaintiff sold the property to Catharine Herrick by a written contract, in which (a certain cash payment being made) it was agreed that the payments stipulated were to be made at a future day, at which time the deed was to be executed by the plaintiff, and in the mean time the purchaser was entitled to possession. While thus in possession, and before the arrival of the stipulated time of payment, the injury complained of was committed. The plaintiff alleged and proved that a building erected upon said premises was injured, and a portion of the same entirely removed from the premises. Evidence was given at the trial to show that the injury was committed by the direction of Mr. and Mrs. Herrick, with the assistance of each of the defendants. After hearing the evidence upon both sides, the judge holding the circuit declined to submit the case to the jury on the question of liability, but charged the jury as matter of law that each of the defendants was liable, and that the only question for the jury to pass upon was the amount of damages to which the plaintiff was entitled. During the trial, the defendants offered to prove "that the plaintiff had no title to the premises in question at the time of making the contract with Mrs. Herrick, or at any other time afterward, and that he did not then have, and has not at any time had, any means, power, or authority of procuring a title thereto." This evidence was excluded, and the defendants excepted. The jury rendered a verdict for the plaintiff, and upon appeal to the general term of the seventh district, the supreme court affirmed the judgment rendered thereon. The defendants now appeal to this court.

The rejection of this evidence was sustained in the court below on the ground that Mrs. Herrick, having recognized the plaintiff's title by her contract of purchase, was estopped to deny it, and that the acts of the defendants having been under her direction, they were estopped also. The court also say, in this connection, that the offer of the defendants was

not to show that they or either of them had title to the premises, but that the plaintiff had none.

A party in possession of premises under a lease, or under a contract of purchase, is certainly estopped, for some purposes, from denying the title of his vendor or lessor. This is upon the principle that he shall not use the possession acquired from an apparent owner to the injury of such owner. Whenever, therefore, the tenant surrenders possession to the lessor, or his term expires, the rule no longer applies; but he is at liberty to assert his right, without the consent of the lessor: *Child v. Chappell*, 9 N. Y. 246. Having given up the advantage of the position received under a claim of title, he is no longer subject to its disabilities: *Jackson v. Spear*, 7 Wend. 401.

This rule of estoppel, it is to be observed, does not apply when the action does not involve the right of possession. Thus, while a tenant cannot deny the landlord's title in an action to recover possession, or for the rent, when the lessee has actually enjoyed the premises, yet he may do so when he has not actually occupied the premises: *Vernam v. Smith*, 15 N. Y. 328, and authorities cited, pp. 329, 330, *q. v.*; and in an action to recover the amount agreed to be paid on a contract of purchase, the purchaser may defend on the ground that the seller has, and can give, no title: *Burwell v. Jackson*, 9 Id. 535; *Fletcher v. Button*, 4 Id. 396; *White v. Foljambe*, 11 Ves. 337; *Stanley v. Stanley*, 18 Id. 508; *Purvis v. Rayer*, 9 Price, 488. In the one case, it would be most unreasonable for a lessee, who has had the full use and benefit of his lease, to say that his lessor had no title. The implied covenant for possession is a sufficient consideration; and whether he had title or had not, the lessee has received the expected benefit, and should pay the promised rent. In the other case, where A, without title, agrees to sell certain premises to B, who, supposing that a title can be given, agrees to pay the purchase-money, it would be unreasonable to compel B to pay the promised sum when it became clear that A could not perform on his part by giving title. The distinction is manifest, and is recognized by the authorities cited above.

In the case before us, the action is not for an injury to the possession. The right of possession was in Mrs. Herrick exclusively at the time of the transactions in question, and such action would be hers exclusively. It is for an injury to the reversion for an injury to the plaintiff's interest in the property

itself; and at the time the action was brought, Mrs. Herrick had abandoned the possession, and the plaintiff had resumed it. Upon the principles stated, it is not clear that Mrs. Herrick herself would be estopped from questioning the ownership. She had yielded what she had received from the plaintiff, to wit, the possession, and both parties stood remitted to their original rights. If she had despoiled the property, she was liable in damages to the owner, and to no one else, and a recovery by a pretended vendor would not protect her against the claims of the real owner.

But the defendants in this action had made no contract whatever with the plaintiff. At the request of Mrs. Herrick, as is assumed, they had injured the house upon the premises. They were doubtless responsible for this act, and could not shield themselves under the direction of Mrs. Herrick, except so far as her interest was affected. But they were not responsible further or otherwise than they would have been if they had committed the injury from their own volition, and without the interference of Mrs. Herrick. A trespass is not aggravated by the circumstance that it is committed at the instance of one having no right to interfere.

The idea of privies is inapplicable to such a case. The defendants have no title and no rights in the premises under any one, and claim none. They are strangers, legally and technically: *Campbell v. Hall*, 16 N. Y. 578, and cases cited. The defendants were therefore responsible to the possessor of the property for injury to the possession, and to the owner of the fee if the injury affected the reversion. The direction of the actual possessor was a defense to any claim to be interposed by her, and they remained responsible to the owner of the reversion alone. We are to assume the offer to be capable of proof to its full extent, and if we suppose that the plaintiff, at the time of the injury, had no title to the property, that he has had none since, and no power or authority to procure it, how are the defendants to be protected from the claim of the real owner when he shall appear? A recovery in favor of a pretender will not protect them; the rights of the actual owner would not be affected thereby.

The case of *Dewey v. Osborn*, 4 Cow. 329, is cited by the respondent, and in some of its features it is very like to the present case. The plaintiff there recovered in ejectment against Barker, and intermediate the judgment and the issuing of an *habere facias*, the defendant in that suit, with the

aid of his neighbors, of whom Osborn was one, removed a building from the premises onto an adjoining lot of Barker's. In an action to recover damages for such removal, it was held that the record of recovery in the suit against Barker was competent evidence in the latter suit. The defendant Osborn did, as the report shows, attack the actual title of the plaintiff, but failed in shaking it, and the court sustained the recovery by the plaintiff.

There is also a class of cases, of which *Whitney v. Lewis*, 21 Wend. 131, is an example, in which the covenant for quiet enjoyment was held to be a sufficient consideration for the agreement to pay, and until the defendant was disturbed in his possession, he could not set up the want of title as a defense to his bond for the purchase-money. This is like the case of possession under a lease already discussed, and is expressly distinguished in *Burwell v. Jackson*, *supra*, from the case of an executory contract to convey.

I think there was error in excluding this evidence, and upon that ground, without examining the further questions in the case, there should be a new trial.

Judgment reversed and new trial awarded.

LYON v. MITCHELL.

[36 NEW YORK, 235.]

PUBLIC POLICY. — CONTRACT TO EMPLOY AGENT TO MAKE OR PROCURE SALE TO GOVERNMENT of articles needed by it is not rendered void, as against public policy, because at the time of the employment reference was made to the fact that the agent was of the same political faith as the party then administering the government, and that he had many acquaintances among the administration, and a good reputation at the place where the sale was to be made, — all of which might aid in bringing about the sale. Such a case is to be distinguished from that where an interference with legislative action or executive clemency is the object, and wherein the party does not profess to act upon commercial principles.

BROKER MAY RECOVER COMMISSIONS UNDER CONTRACT BY TERMS OF WHICH he was to receive ten per cent of the price if he should dispose of certain steamers at prices and conditions to be agreed on, where the evidence shows that his action in the matter did direct the attention of the purchasers to the vessels he had for sale, and led to the negotiations which resulted in the purchase of the vessel, although he did not actually make the sale and transfer.

ACTION by Stillman to recover his compensation agreed on in a written agreement, which was in the following words:

"Whereas, I desire to sell the steamers Augusta, Alabama, Florida, and Star of the South: Now, in consideration thereof, and of one dollar to me in hand paid by Thomas B. Stillman, of the city of New York, I do hereby constitute him, the said Stillman, my true and lawful agent or attorney, to dispose of said steamers, or either of them, at such prices and on such terms as may be hereafter agreed upon. And I do hereby agree to pay to said Stillman, his heirs or assigns, ten per cent of the total amount that said steamers, or either of them, may be sold for," plaintiff averring that under the agreement, and in consequence of his efforts, a sale of three of the steamers had been effected. Defendant denied that plaintiff had ever procured a customer for the vessels, or brought about the negotiations which resulted in the sale, but claimed that the vessels were sold to George D. Morgan, the authorized agent of the navy department, without plaintiff's aid or intervention, and that a brokerage of two and one half per cent was paid to Mr. Morgan for the sale. Plaintiff died, and his executor continued the action. The remaining facts appear in the opinion.

Henry A. Crane, for the appellant.

William F. Allen, for the respondent.

By Court, HUNT, J. The defendant asks that the judgment below shall be reversed, upon the ground that the judge declined to charge "that to entitle the plaintiff to recover, the jury must be satisfied that his agency was the procuring cause of the sale." The charge actually made was, that the jury must find "that Mr. Stillman's action in the matter did direct or draw the attention of the navy department, or of Mr. Morgan, to these steamers, as vessels that were offered for sale, and led to the negotiations that resulted in the purchase of the vessels." The two propositions are substantially the same, and the language employed by the judge embodied the proposition as fairly as that desired by the counsel. The defendant claims a ruling that "Stillman's agency was the procuring cause of the sale." This sale, it was proved, was made to the navy department through Mr. Morgan. It was conceded on both sides that the actual sale and transfer was always expected to be made by the defendant, and the question was, whether the means employed by the plaintiff had resulted in producing the sale that did take place. The question as submitted by the judge was, whether Stillman's action in the matter led to the negotiations that resulted in the purchase of

the vessels. The prominent idea of each proposition is the same, and the jury, I doubt not, acted upon the precise principle laid down by the defendant's counsel. I see no error in this particular.

The defendant insists, also, that the contract, as established by the evidence, was in conflict with good morals and against public policy, and therefore void. The evidence showed that the defendant asked the plaintiff if he could sell those steamers. He replied that he did not know. Defendant said: "You are acquainted with the Republican members of the administration?" The plaintiff replied that he was acquainted with some, and had friends who could introduce him to others, and who could aid him.

The defendant submitted to the court a series of propositions, which he requested him to charge, and under the fourth one of which he desires to raise the present question. That proposition commences in these words: "Any contract which conflicts with the morals of the time, and contravenes any established interest of society, is void, as being against public policy." It then asks the application of such principles to the present case. This is the only one of the requests looking to this subject.

The defendant, I think, had no right to ask a charge that "any contract which conflicts with the morals of the time" is void, as being against public policy. To make a contract thus void, it must be against sound morals. Morality is defined by Paley to be "that science which teaches men their duty, and the reason of it": Paley's Moral Philosophy, b. 1, c. 1. "Morality is the rule which teaches us to live soberly and honestly; it hath four chief virtues,—justice, prudence, temperance, and fortitude": Bishop Horne's Works, vol. 6, Charge to Clergy of Norwich. To make a contract void on the principle claimed, it must be against morality as thus defined. The "morals of the time" may be vicious; public sentiment may be depraved; the people may have all gone astray, so that not one good man can be found. Sound morals, as taught by the wise men of antiquity, as confirmed by the precepts of the Gospel, and as explained by Paley and Horne, are unchangeable; they are the same yesterday and to-day.

The proposition under consideration also contains a statement that a contract which "contravenes any established interest of society" is void, as being against public policy

This position is equally unsound, but I will not enlarge upon it.

My examination of this question upon the merits has also brought me to the conclusion that no valid objection can be made to the decision of the judge at the circuit. The whole of the defendant's fourth request to charge, and upon which the question arises, is as follows: "Any contract which conflicts with the morals of the time, and contravenes any established interest of society, is void, as being against public policy. If the jury believe that the agreement on which this action is brought was made in reference to the influence of the plaintiff, or his friends, with the Republican members of the administration, or with any persons connected with the administration whose duty it was to act in the purchase of steamers, and the percentage, as commissions, was fixed in reference to that influence, that the contract is void, and no action can be sustained upon it."

The defendant and those concerned with him had these four steamers on hand; the coasting trade, in which they had been employed, was broken up by the inauguration of war at the South. Open war against the government of the United States had been commenced nearly a month before the date of this contract. The vessels were useless for the service in which they had been employed, and for the business in which the defendant was engaged. A deduction of ten per cent upon their value, or the payment of commissions to that amount, was not an unreasonable inducement to a sale, under such circumstances. No inference of corrupt intention can, therefore, be drawn from the payment of a larger commission than was usually paid for the services of an agent or broker.

The proposition under consideration, it will also be observed, makes no reference to corrupt intentions on the part of the agent, or of pecuniary influences to be used by him, or secret service to be employed. It presents but a single point; namely, that if the fact that the plaintiff or his friends had influence with the administration, or with those whose duty it was to purchase steamers, was an inducement to the contract, then the contract is void. Two classes of cases are cited in support of this proposition; viz., where a contract has been made to induce a particular legislative action, and where a contract has been made to procure appointments to office.

Several cases of these classes are referred to in the recent

case of *Providence Tool Co. v. Norris*, 2 Wall. 45, and are cited with approval. Among them is *Marshall v. Baltimore and Ohio R. R. Co.*, 16 How. 314, where the principle is laid down that all contracts for contingent compensation for obtaining legislation, or to use personal or secret or sinister influence on legislators, is void. That where an agent contracts to use or does use secret influences to affect legislative action, the contract respecting it is void. The learned judge, in deciding the case, says: "Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is committed." It was further said that all contracts to evade the revenue laws are void, as well as all marriage-brochage contracts, and contracts for procuring appointments to office.

In aid of these views may also be cited *Hatzfield v. Gulden*, 7 Watts, 152 [31 Am. Dec. 750], which was an agreement to obtain signatures for a pardon; and *Clippinger v. Hepbaugh*, 5 Watts & S. 315 [40 Am. Dec. 519], which was an agreement to procure the passage of a legislative act by personal influence; and *Pingry v. Washburn*, 1 Aik. 264 [15 Am. Dec. 676], which was an agreement to pay for the withdrawal of opposition to an act of the legislature; and *Harris v. Roof*, 10 Barb. 489, which was an agreement to obtain legislative action recognizing an ancient land grant; and *Debenham v. Ox*, 1 Ves. Sr. 276, which was an agreement to pay for soliciting a will in favor of another. Of the same general character is *Gray v. Hook*, 4 N. Y. 449, where two persons being applicants for an office, it was agreed that one should withdraw and aid the other in procuring the office, and in consideration thereof the fees should be divided between them; the agreement was held void.

The general rule as laid down in the cases cited is a salutary one. Care is necessary, however, in its application; certain other rules and principles are also to be remembered. Thus the right to sell and dispose of property is an essential element of ownership; it is a right to which the owner is entitled to the full and unrestricted enjoyment. So the time, place, and manner of sale are within the range of an owner's rights; he may sell personally or by agent at private sale or by public auction; he may employ that agent who, by his

zeal, his activity, his acquaintance, or his good character, may be likely to obtain the best price for the articles to be sold. So, also, a suitor in the courts of justice may employ that advocate who in his opinion has the best qualifications to obtain the judgment he desires; to do so is his undoubted right. Learning, industry, eloquence, high personal character, the esteem in which he is held by the court, may all justly be considered by the party making the employment. It is allowable to employ counsel to appear before a legislative committee, or before the legislature itself, to advocate or oppose a measure in which the individual has an interest: *Mills v. Mills*, 36 Barb. 474; *Hillyer v. Trarene*, 1 Am. Law Reg. 146; *Howden v. Simpson*, 10 Ad. & E. 793. It is allowable, and not unusual, to employ counsel thus to appear before the governor of the state when he has under consideration the propriety of giving his sanction to a bill which has passed both branches of the legislature. Will it be insisted that no advocate can be legally employed thus to appear, unless he is of doubtful reputation, or personally offensive to the legislature or governor, or unless he belongs to a different political party? I apprehend not. An advocate of high personal character would naturally and most properly be employed in the discharge of such duties, and one who was likely by his personal qualities, or his political position, to be acceptable to the body before which he was to appear. The possession of such qualifications, and the knowledge of and reference to it, would form no objection to the employment. For an honest purpose, avowed to the body before which the appearance is made, and by the use of just argument and sound reasoning, this is lawful: Authorities *supra*. These principles are equally plain with those restricting the sale of political influence. Neither class of cases can be overthrown; the law is to be so applied that both may be preserved.

A distinction may also well be made upon those cases, which I think will dispose of the present question. Personal solicitations of legislators or of judges is not a lawful subject of contract. Personal solicitations of the president, the governor, or the heads of department for favors or for clemency, is not the lawful subject of a contract. The apprehension that considerations other than those of a high sense of duty and of the public interest may thus be brought to influence their determination, forbids this employment. But a different principle prevails where property is offered for sale to the government,

and where a bargain is sought to be made with them, and where there is no concealment of the agency; it then becomes a matter of traffic. The agent says that he has vessels or arms for sale, and that he can furnish the government with what it needs, and at a fair price; that the vessels are owned by Mr. Mitchell, or the arms are manufactured at Providence. As a general principle, the seller desires to obtain a high price, while the buyer desires to purchase at a low one; this element is known and appreciated by each party in making a bargain. I know of no principle upon which a seller should be compelled to employ an agent who would be looked upon with suspicion and distrust by the party to whom he wished to sell. In a time of revolution, when the Southern Confederacy, against which the arms or vessels were to be used, had friends at the North, would it be a legal objection to an agent desiring to sell munitions of war that his loyalty to the government was undoubted? I cannot think so. The present case was one of bargain and sale simply. No fraud upon the government is imputed, no suggestion is made of pecuniary influence to be used, no intended corruption is suggested. The case to be decided is free from the existence of any of these elements.

An agent of the same political party with the executive or the heads of departments, having acquaintances and a reputation which would enable him to make an advantageous presentation of his merchandise, may, in my opinion, be lawfully employed to make such sale, and with reference to those qualifications. The decision in *Providence Tool Co. v. Norris*, 2 Wall. 45, confounds a sale or traffic openly made by an avowed agent to a party wishing to purchase, with the forbidden case of an interference with legislative action or executive clemency, where the party does not profess to act upon commercial principles. There is a manifest difference in the principle governing the cases. I think that case was not well considered, and cannot adopt it as an authority for the present. Judged by the principles I have set forth, the ruling at the trial was correct.

The rule of damages was rightly laid down; and I see nothing in the other points raised which will require a new trial. Judgment should be affirmed.

GROVER, J., filed a dissenting opinion. After stating the facts and proceedings in the court below, he said in substance as follows: There are a large number of questions discussed by counsel which are not raised by any legiti-

mate exception. At the close of the testimony, defendant's counsel presented ten requests to charge particular propositions, and after the charge, excepted thereto, in so far as the charge differed from the requests. Such an exception raises no question of law. It is too general. It has been repeatedly held that a party excepting to a charge must put his finger upon the point complained of, so that the judge and opposite party may readily understand it, or the exception will be of no avail: *Chamberlain v. Pratt*, 33 N. Y. 47. And since the point argued by counsel, that the contract between the parties, as shown by the proof, contemplated the use by the plaintiff of improper influences to induce the officers of the government to purchase the ships, and rendered the contract illegal and void, would be raised in this case by such exceptions only, the question is not before the court and cannot be considered.

The court did not err in refusing to dismiss the complaint upon the ground that defendant did not own the vessels. He contracted in his own name, and personally agreed to pay the commission. It was lawful for him to do this if he chose, whether he owned the vessels or not.

The position taken by appellant's counsel, that it was against public policy to restrict by contract the power of sale of the vessels to one individual, is untenable, for such contract did not divest the owner's power to sell, and even if it had, the restriction would not be illegal. An owner certainly has a right to delegate his exclusive power to sell to another.

The important question is, whether Stillman became entitled to the commission specified in the contract, by virtue of his acts in directing the attention of the navy department or of Morgan to the vessels offered for sale, so as to lead to the negotiations which resulted in the contract. The charge excepted to held that these facts did so entitle him. In this I think there is error. A fair construction of the contract is, that Stillman was not only to direct attention to the vessels, so as to bring about negotiations, but was himself to negotiate a sale of the vessels at prices to be agreed on. Where a large compensation is given to an agent for the transaction of business, it is his skill that induces the employment; and such skill he is bound to apply to the conduct of the business. The object of a contract with an agent to negotiate a sale is to relieve the principal from the burden of the business; and to earn his commission, the agent should transact the entire business. None of the authorities cited as sustaining the principle of the charge will support it. In *Doty v. Miller*, 46 Barb. 529, the broker negotiating the contract was held entitled to his compensation, though the contract failed in consequence of a defect in the principal's title. *Glentworth v. Louvre*, 21 Id. 45, holds that a broker with power to sell but not to convey earns his commission by finding an acceptable and willing purchaser. In *Moses v. Bierling*, 31 N. Y. 463, the broker was to procure a purchaser at a price satisfactory to the principal, the broker to have the exclusive sale of the property. It was held that the broker's right to commissions could not be defeated by a prior sale through another broker. This latter case is one in which the broker was prevented from performing his contract, and he is entitled to his commission, if in no other way, at least as damages for breach of the contract with him.

Some of the judges are of opinion that the exceptions raised the question whether the evidence given required the judge below to submit to the jury the question whether the contract contemplated the use of corrupt means to induce the purchase of the vessels, and arrive at the conclusion that no evidence was given. In this I do not concur. Though the contract does not so show, the evidence conclusively establishes the fact that the United States

government was the only purchaser in view of the parties, and this is shown by the inquiries made of the plaintiff as to his standing with the administration, and the like, and the fact that upon stating his standing the contract was made for as large a commission as ten per cent, which amounted to twenty or thirty thousand dollars. If such a large commission was given for the purpose of bringing to bear upon the administration influence which would induce the purchase, or a purchase on more favorable terms than otherwise, the contract is corrupt and plainly contrary to public policy; whereas if merely intended as a compensation, the contract is good. In the present case, it is not reasonable to suppose that defendant would give one tenth of the proceeds of so large a sale merely for the negotiation of the bargain. The evidence plainly points to what was intended; namely, the procurement of political influence and favoritism. As I do not believe the exception raises the question, I shall not discuss it further. For the reasons stated, the judgment should be reversed and a new trial ordered.

CONTRACTS FOR SERVICES WHICH ARE VOID, AS AGAINST PUBLIC POLICY: See the extended note to *Parsons v. Trask*, 66 Am. Dec. 506 et seq. discussing fully the question of the validity of contracts more or less similar to that stated in the principal case. Agreements to render services in procuring and consummating contracts with officers or the government are good where the purpose is a fair commercial transaction, and there is no concealment of the agency; but where the agreement is for lobby services, or to procure personal influence in order to secure the contract, it is against public policy, and void: *McKee v. Cheney*, 52 How. Pr. 145; *Mills v. Mills*, 40 N. Y. 545, both citing the principal case. In *Russell v. Burton*, 66 Barb. 543, the court, commenting on the principal case, say that if an agreement of this nature is contrary to public policy, the objection to its validity will be taken by the court, even if the party has not pleaded the invalidity or in any other manner set it up. But in *Cummins v. Barkalow*, 1 Abb. App. 485, S. C., 4 Keyes, 524, citing the principal case, it is said that advantage must be taken of the invalidity of the contract, if not by answer or motion for nonsuit, at least by a request for a finding as to whether the services rendered were improper or unlawful in their character.

RIGHT OF BROKER TO COMMISSIONS FOR SALE: See *Tinges v. Moale*, 90 Am. Dec. 93, and case cited in note. In *Redfield v. Tegg*, 38 N. Y. 217, the principal case is cited and commented upon, and it is said that the ruling in that case, that a broker may recover commissions if a sale resulted from his information given to another broker, who in pursuance thereof negotiated the sale, is not good law. And in other cases the principal case is cited, and it is held that the broker must have been the actual means of procuring the purchaser, — that he must have produced a purchaser ready and willing to buy, before he can recover his commissions: *Smith v. McGovern*, 65 Id. 575; *McClave v. Paine*, 49 Id. 563; *Wylie v. Marine Nat. Bank*, 61 Id. 416.

TREVOR v. WOOD.

[36 NEW YORK, 307.]

OFFER OF ONE PARTY BY TELEGRAPH AND ACCEPTANCE BY OTHER through the same means constitute a binding agreement between parties who agree to deal by telegraph, and this, although the acceptance is not received in time to enable the latter party to comply with his proposal in consequence of a derangement of the telegraph line.

TELEGRAM ACCEPTING OFFER BY TELEGRAPH TO SELL, together with letter of same date signed by same party and to the same effect, afford sufficient evidence of subscription by said party to take the case out of the statute of frauds.

ACTION by Trevor and Colgate of New York against John Wood & Co., of New Orleans, for damages for breach of contract to sell and deliver fifty thousand Mexican dollars. An agreement had been entered into between the parties that in the course of their dealings in the purchase and sale of dollars, all communications should be by telegraph. On January 30, 1860, Trevor and Colgate telegraphed to Wood & Co., asking their price for one hundred thousand Mexican dollars. Wood & Co. on the next day answered also by telegraph that they would deliver fifty thousand of the dollars at seven and one quarter, upon which, on the same day, Trevor and Colgate telegraphed as follows: "To John Wood & Co., — Your offer of fifty thousand Mexicans at $7\frac{1}{4}$ accepted; send more if you can. Trevor and Colgate." At the same time Trevor and Colgate sent by mail to Wood & Co. a letter acknowledging receipt of Wood & Co.'s telegram, and inserting a copy of their telegraphic answer. Wood & Co. did likewise. On the next day Trevor & Co. again sent a similar telegram, asking a reply. Neither of the latter telegrams reached Wood & Co. until February 4th, because of some derangement of the lines, of which Trevor & Co. did not know until February 4th. On February 3d Wood & Co. telegraphed to Trevor & Co.: "No answer to our dispatch; dollars sold"; and on the same day mailed a letter to that effect, upon receipt of which Trevor & Co. telegraphed: "To John Wood & Co., — Your offer was accepted on receipt"; "The dollars must come, or we will hold you responsible"; "Send by this or next steamer"; and "Don't fail to send the dollars at any price." To all of said telegrams Wood & Co., answered by telegraph, "No dollars to be had. We may ship by 12th as you propose, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract. Judgment went for plaintiffs, and

defendants appealed. The judgment below is reported in 41 Barb. 255. The remaining facts appear in the opinion.

George Thompson, for the appellants.

W. Z. Larned, for the respondents.

By Court, SCRUGHAM, J. The offer of the respondents was made on the 31st of January, and they did not attempt to revoke it until the 3d of February. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case is, whether a contract was created by this acceptance before knowledge of it reached the respondents. The case of *Mactier v. Frith*, 6 Wend. 103 [21 Am. Dec. 261], in the late court of errors, settles this precise question, and was so regarded by this court in *Vassar v. Camp*, 11 N. Y. 442, where it is said that the principle established in the case of *Mactier v. Frith*, *supra*, was, that it was only necessary "that there should be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act; and that the sending of a letter announcing a consent to the proposal was a sufficient manifestation, and consummated the contract from the time it was sent." There is nothing in either the case of *Mactier v. Frith*, *supra*, nor in that of *Vassar v. Camp*, *supra*, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office, and in fact the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act, clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus marking that *aggregatio mentium* which is necessary to constitute a contract. Mr. Justice Marcy, in delivering the leading opinion in *Mactier v. Frith*, *supra*, says: "What shall constitute an acceptance will depend in a great measure upon circumstances. The mere determination of the mind unacted on can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept returned through him, or

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TREVOR v. WOOD.

sent by another, would seem to be all the law requires. The contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated, or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract."

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement, the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately dispatched from New York by order of the appellants. It cannot therefore be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted. Under these circumstances, the sending of the dispatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication, the parties mutually assume its hazards, which are principally as to the prompt receipt of the dispatches.

The referee finds as a fact that the respondents answered the telegram of the appellants asking at what price they would sell one hundred thousand Mexican dollars by another telegram, as follows, viz.:—

"TREVOR AND COLGATE, New York.

"Will deliver fifty thousand, at seven and one quarter, per Moses Taylor. Answer. JOHN WOOD & Co."

It was proved on the trial that this telegram was sent by the respondents, and a letter of the same date, signed by

them, repeating the telegram and stating that they had sent it, was read in evidence. This affords sufficient evidence of subscription by the respondents to take the case out of the statute of frauds. The judgment should be reversed.

Order reversed, and judgment of the special term affirmed.

CONTRACTS BY TELEGRAPH. — Since the introduction of the electric telegraph as a means of conveying intelligence, the same rules that had been established in reference to the negotiation of contracts by correspondence through the post-office have been extended in their application to the new method of communication. Both in this country and in England it is well settled that, so far as the negotiation of contracts is concerned, there is no difference between the telegraph and the mail: Hare on Contracts, 362; Pollock on Principles of Contract, 17; Gray on Communication by Telegraph, sec. 112; Redfield, J., in 14 Am. Law Reg., N. S., 406; *Stevenson v. McLean*, L. R. 5 Q. B. D. 346; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *True v. International Telegraph Co.*, 60 Me. 9; *Hallock v. Commercial Insurance Co.*, 26 N. J. L. 268. Nelson, J., delivering the opinion of the court in *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 434, said: "It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission." And Vredenburg, J., in delivering the opinion of the court in *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 282, said: "There is in fact no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air; in the other, written signs carried by the mail or by telegraph. The vital question is, Was the intention manifested by any overt act? not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act."

Hare, in his recent work on contracts, in discussing this question, says: "The inclination of the authorities seems to be that contracts made by telegraph obey the same rule as contracts through the mail, and are complete as soon as the acceptance is left at the office of the telegraph company for transmission, although the sender withdraws the message immediately afterwards, and before it is forwarded to the party from whom the offer came or the contents have been communicated in any other way": Hare on Contracts, 362. And it seems that the telegraph may be used by the contracting parties without any previous understanding to that effect between them: Scott and Jarnagin on Law of Telegraphs, sec. 295.

WHICH OF CONTRACTING PARTIES RESPONSIBLE FOR MISTAKES IN MESSAGE. — On this subject there seems to be a conflict between the American and the English decisions. In this country, it appears to be the established rule that the party initiating the negotiation is responsible for the correct transmission of his message, whether it be an offer or an inquiry, and that he is bound by it in the terms in which it is delivered to the party addressed: Bishop on Contracts, sec. 328; 14 Am. Law Reg. 402; *Durkee v. Vermont Cent. R. R. Co.*, 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431; and see

Dunning v. Roberts, 35 Barb. 463; *New York & W. Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298; S. C., 78 Am. Dec. 338. Mr. Bishop, discussing this subject, says: "One who makes an offer by mail or by telegraph constitutes thereby the post-office or telegraph company his agent for its transmission. Therefore, if it is not delivered, it amounts to nothing; or, if the telegram is altered in the transmission, he is bound by it as transmitted. And if the receiver accepts the offer, the contract becomes complete on the delivery of the answer of acceptance at the post or telegraph office; nor is an actual receiving of it essential": Bishop on Contracts, sec. 328.

In England, however, it is held that the sender of a message by telegraph through the post-office department is not bound by errors or mistakes made in its transmission: Leake on Law of Contracts, 39; *Henkel v. Pape*, L. R. 6 Ex. 7. In the case of *Henkel v. Pape*, *supra*, the defendant had been negotiating with the plaintiff for the purchase from him of fifty rifles. Subsequently he delivered to the telegraph operator an order to be transmitted to the plaintiff for three rifles. The operator sent the message for the rifles. The plaintiff, connecting this order with the former negotiation, sent fifty rifles, which the defendant refused to accept. The plaintiff sued for the fifty rifles, but the court held that he could only recover for the three which the defendant had actually ordered. The English courts have decided that in such cases the plaintiff has no redress against the telegraph company, on the ground of want of privity, not having employed the company himself: *Playford v. United Kingdom E. T. Co.*, L. R. 4 Q. B. 706; *Dickson v. Renter's Tel. Co.*, L. R. 2 C. P. D. 62.

WHEN CONTRACT NEGOTIATED BY MAIL OR TELEGRAPH IS CONSUMMATED. — As to contracts negotiated by letter through the mail, it has been long settled, both in this country and in England, that an unqualified acceptance by one party of the terms proposed by the other, transmitted by due course of mail, is a closing of the bargain from the time of such transmission of the acceptance. The contract is regarded as complete as soon as the letter containing the acceptance is mailed. And the same rule is applied to contracts negotiated by telegraph. The contract becomes complete the moment the message containing an unqualified acceptance is delivered to the telegraph company for transmission. And such acceptance is, in this country, at the risk of the party whose proposition is accepted, whether it arrives in due course of the telegraph, correctly or incorrectly, or not at all: *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Newcomb v. De Roos*, 2 El. & E. 271; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Harris's Case*, L. R. 7 Ch. 587; *Hebb's Case*, L. R. 4 Eq. 9; *Byrne v. Tienhoven*, L. R. 5 C. P. D. 344; *Household F. & C. A. I. Co. v. Grant*, L. R. 4 Ex. D. 216; *Haas v. Myers*, 111 Ill. 421; S. C., 53 Am. Rep. 634; *Barr v. Insurance Co. of N. A.*, 61 Ind. 495, citing the principal case; *Moore v. Pierson*, 6 Iowa, 279; S. C., 71 Am. Dec. 409; *Ferrier v. Storer*, 63 Iowa, 484; *Siebold v. Davis*, 67 Id. 560; *Abbott v. Shepard*, 48 N. H. 14; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Commercial Ins. Co. v. Hallock*, 27 Id. 645; *Mactier v. Frith*, 6 Wend. 103; *Brisban v. Boyd*, 4 Paige, 17; *Vassar v. Camp*, 11 N. Y. 441; *Hamilton v. Lycoming M. I. Co.*, 5 Pa. St. 339; *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127; *Prosser v. Henderson*, 20 U. C. Q. B. 438; *Taylor v. Merchants' F. Ins. Co.*, 9 How. 390; *Darlington Iron Co. v. Foote*, 16 Fed. Rep. 646; 2 Kent's Com. 477; 14 Am. Law Reg. 406; Gray on Communication by Telegraph, sec. 115; Scott and Jarnagin on Law of Telegraphs, sec. 347. When an offer is made by letter, an acceptance by written communication takes effect from the time when the letter containing the acceptance is mailed, and not from the time when it was

received by the other party: *Potter v. Sanders*, 6 Hare, 1; *Levy v. Cohen*, 4 Ga. 1; *Stockham v. Stockham*, 32 Md. 196. The person making the offer may, if he choose, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance: *Lewis v. Browning*, 130 Mass. 173; *Vassar v. Camp*, 11 N. Y. 441. But if he does not do so, the contract is binding upon him from the time the acceptance is deposited for transmission to him, although the letter or message is in fact never received by him: *Duncan v. Topham*, 8 Com. B. 225; *Vassar v. Camp*, 11 N. Y. 441; *Washburn v. Fletcher*, 42 Wis. 152. If an offer is not retracted, it is considered as continuing in force until the time for accepting or rejecting it has arrived: *Stevenson v. McLean*, L. R. 5 Q. B. D. 346. But as soon as the acceptance has been mailed or delivered to the telegraph company for transmission, the contract is complete, and the offer cannot then be retracted without the consent of the party who accepted it: *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Wheat v. Cross*, 31 Md. 99; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645. But see *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278. The acceptance, however, must be unconditional. If it is conditional only, the offerer may withdraw his offer: *Haas v. Myers*, 111 Ill. 421; S. C., 53 Am. Rep. 634; *Baxter v. Bishop*, 65 Iowa, 582; *Baker v. Holt*, 56 Wis. 100; *Martin v. Northwestern Fuel Co.*, 22 Fed. Rep. 596.

ACCEPTANCE MUST BE MAILED OR TELEGRAPHED WITHIN REASONABLE TIME after the receipt of the offer, unless the circumstances or the language of the offer justify delay. If it is not sent within a reasonable time, and before a countermand is received, it will not conclude the contract: Hare on Contracts, 340; 14 Am. Law Reg. 406; *Duncan v. Topham*, 8 Com. B. 225; *Minnesota Oil Co. v. Collier White Lead Co.*, 4 Dill. 431; *Averill v. Hedge*, 12 Conn. 424; *Stockham v. Stockham*, 32 Md. 196; *Abbott v. Shepard*, 48 N. H. 14. And in case of a proposition by telegraph for the sale of goods, the market for which is subject to sudden and great fluctuations, an immediate answer should be given; and an acceptance of such offer telegraphed after a delay of twenty-four hours from the time of its receipt is not an acceptance within a reasonable time, and does not operate to complete the contract: *Minnesota Oil Co. v. Collier White Lead Co.*, 4 Dill. 431.

STATUTE OF FRAUDS IS SUFFICIENTLY COMPLIED WITH by a message written and signed by the sender, and delivered to the telegraph company for transmission: Leake on Law of Contracts, 265; *Godwin v. Francis*, L. R. 5 Com. P. 295; *Hawley v. Whipple*, 48 N. H. 487. But where the proposal and acceptance do not completely fit, there is no sufficient memorandum to satisfy the statute of frauds: Bishop on Contracts, sec. 1248.

TELEGRAM RELIED UPON TO ESTABLISH CONTRACT MUST BE PROVED in the same manner as other writings are, by the production of the original. If that is lost, it may be proved by a copy, if there is one; and if not, by oral testimony respecting it: *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127; 14 Am. Law Reg. 406; Scott and Jarnagin on Law of Telegraphs, sec. 345.

THE PRINCIPAL CASE IS CITED to these points in the following cases: A deposit of a letter containing the note in the post-office, in the state of New York, addressed to the cashier to whom the note was payable (having been done by the payee's direction), is a delivery of the note to the payee: *Wayne Co. S. B. v. Low*, 6 Abb. N. C. 90. The concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act, makes a binding agreement: *People v. Fay*, 3 Lans. 402; *Fried v. Royal Ins. Co.*, 50 N. Y. 250; *Harvard v. Daly*, 61 Id. 366.

Hare, in his recently published work on contracts, at page 365, referring to the principal case, says: "The distinctive feature of this case seems to have been the agreement that all the negotiations that might take place between the parties should be by telegraph. But for this stipulation, the letter which was posted immediately on the receipt of the defendant's offer of January 31st would have perfected the contract and precluded a change of purpose. The effect was to supersede the post-office and put the telegraph in its place as the agency on which both parties relied, and which was to act for and represent both. The judgment can hardly therefore be regarded as establishing that, in the absence of such an agreement, leaving a message at a telegraph office is equivalent to mailing it."

WESTERLO v. DE WITT.

[33 NEW YORK, 341.]

UNLESS CERTAIN THAT REFEREE IS IN ERROR IN FINDINGS OF FACT, court will sustain such findings.

TITLE TO CHoses IN ACTION, SUCH AS NOTES NOT INDORSED, money, and certificates representing money, may pass by delivery only, as gifts *causa mortis*.

ACTION by Jane Westerlo to compel the return of a certificate of deposit of fifteen hundred dollars, or its value to her, it having been delivered by her to the respondent, De Witt, under a misapprehension of her rights. It seems that Miss Westerlo, having received the certificate of deposit as detailed in the opinion, upon the advice of De Witt, the executor of the will of Mrs. Clinton, returned such certificate to him, assuming, upon his advice, that she had no right thereto. The remaining facts appear in the opinion.

John L. Sutherland, for the appellant.

Charles Jones, for the respondent.

By Court, HUNT, J. The general disposition of the courts is to sustain the referee in his findings of facts. By section 272 of the Code, power is given to the general term to review the finding of the referee, and in case of reversal upon the facts, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in this court. In examining the evidence, a majority of the judges of the supreme court took a different view of the facts and of the law from that taken by the referee, while a minority concurred with him in both respects. The question is now before us, and in the same manner, and as an original question, that it was before the general term. In the

language of the Code, *supra*, the question whether the judgment should have been reversed is the one before us. This is not precisely the same question as if we were inquired of, whether we should have found the same facts, and have determined the law in the same manner. It is rather, Are we so certain that the referee was in error upon the facts that we will assume to reverse his judgment? If the case is doubtful, his conclusions should not be reversed; if, upon reading the evidence, this court should be of the opinion that the conclusion might well have been either way, then the fact that the referee saw the witnesses, heard them testify, and had the nameless opportunities of judging of their character that personal acquaintance can only give, should induce us to defer to his judgment. If, upon the other hand, we are clearly of the opinion that he erred in deciding the facts, we are bound to "reverse his judgment": *Ball v. Loomis*, 29 N. Y. 412; *Petersen v. Rawson*, 34 Id. 370. After a careful reading of this case, I am inclined to concur in the view of the referee, and of the judge who delivered the dissenting opinion in the court below.

It is clear, upon the authorities cited, that choses in action, such as bonds and mortgages, and promissory notes not indorsed, may be well transferred by delivery only, as a *donatio causa mortis*: *Duffield v. Elles*, 1 Bligh, N. S., 497, 542; *Brown v. Brown*, 18 Conn. 410 [48 Am. Dec. 52]; *Bedell v. Carr*, 33 N. Y. 581. As in the case of a gift *inter vivos*, the transfer of such a security would be accompanied with some inconvenience. More and different evidence would be required, in enforcing the claim, than where a specific chattel had been delivered, or an indorsement or a formal written transfer of the security had been made. Still, it is quite clear that in either case, in apprehension of death, or among the living, the gift of a mortgage, or an unindorsed note, may be affected by a simple delivery of the security.

The evidence of Miss Westerlo establishes satisfactorily that there was an actual delivery to her of the certificate, as a gift from Mrs. Clinton, in apprehension of death. She desired Miss Westerlo to go to her closet, and look in the pocket of a particular dress, in which she would find a roll of paper, which she requested to be brought to her. The parcel wrapped in a piece of paper and pinned together was brought to Mrs. Clinton, who proceeded to open it. It contained the certificate in question, and a small roll of bills, amounting to six hundred

dollars. Mrs. Clinton counted the money, and read over the certificate. She then rolled the bills together in the same paper with the certificate, and handed the whole to Miss Westerlo, saying: "I give this to you; this is for yourself; no one knows anything about it, and I do not wish to tell of it." She then told Miss Westerlo to put away the parcel where she had found it, as that was the safest place, desired her to lock the door, and place some article of furniture against it. Mrs. Clinton at the same time told Miss Westerlo that she had also remembered her in her will, and indulged in strong expressions of love and affection. Miss Westerlo placed the parcel in the pocket as desired. The referee held this to be a competent delivery, and that Mrs. Clinton did not expect or intend to retain any control over the possession of the money or security after that date. I find no occasion to reverse his judgment on this point, and I see nothing in the manner of detailing the transaction by Miss Westerlo afterwards that interferes with this view. She was frank, ingenuous, stated the facts as they occurred, with her doubts as to their effect, and asking the advice of others, who were supposed to be better informed than herself.

The money and the security stand upon the same ground; both are susceptible of being presented as a gift by delivery; they were both in the same envelope; and the same words were applied in giving each. Handing her the paper containing both the money and the certificate, Mrs. Clinton says: "I give this to you; it is for yourself." It is impossible to apply any rule which would make this a valid gift as to the money and invalid as to the certificate; they must stand or fall together. I think it was good as to both.

If the view I have taken is the correct one, the certificate was given to Mr. De Witt by Miss Westerlo upon a mutual misunderstanding of her rights. He supposing and advising her that she had no title to the certificate, but that the same belonged to the estate of Mrs. Clinton, and she, in reliance upon such advice, giving to him the certificate upon which he afterwards received the money. The referee finds that Mr. De Witt acted in entire good faith, in which conclusion I concur entirely. Mr. De Witt had not qualified as executor, nor, according to the ordinary course of events, had the will been proved when he received the certificate. If it has been entered in his accounts, the judgment of this court that it was so received and entered by mistake will be a sufficient war-

rant for its repayment by him. He received himself, under the circumstances mentioned, the property of Miss Westerlo in the form of the certificate; its value should now be returned to the plaintiff. I am for a reversal of the judgment of the general term, and for affirming the judgment of the referee..

Order reversed, and judgment of the special term affirmed.

GROVER, J., dissented.

WHETHER PROMISSORY NOTES WILL PASS BY DELIVERY AS GIFTS *causa mortis*, see *Ashbrook v. Ryon's Adm'r*, 92 Am. Dec. 481, and note. To the point that choses in action may pass by delivery, without assignment, as gifts *causa mortis*, see the principal case cited in *Johnson v. Spies*, 5 Hun, 470; *Montgomery v. Miller*, 3 Redf. 164; *Cornell v. Cornell*, 12 Hun, 313; *Gray v. Barton*, 55 N. Y. 72; and such gifts may be valid between husband and wife: *Mack v. Mack*, 5 Thomp. & C. 530; and even as gifts *inter vivos*: *Mack v. Mack*, 3 Hun, 325; *Trow v. Shannon*, 8 Daly, 242; and in cases of such gifts *causa mortis*, courts compel the representatives of the donor to allow the donee to sue in their name: *Grymes v. Hone*, 49 N. Y. 23, all citing the principal case.

CONCLUSIVENESS OF FINDINGS OF REFEREES ON QUESTIONS OF FACT: See *Olcott v. Tioga R. R. Co.*, 84 Am. Dec. 298, and note; *Stockwell v. Phelps*, 90 Id. 710. Where the evidence is conflicting, courts will always sustain such findings: *Russell v. Burton*, 66 Barb. 542; *Park Bank v. Watson*, 42 N. Y. 490; *Hughes v. Mercantile M. I. Co.*, 55 Id. 265, all citing the principal case.

PEOPLE v. VILAS.

[36 NEW YORK, 459.]

SURETIES UPON BOND OF PUBLIC OFFICER ARE NOT DISCHARGED by imposition upon the principals, by the legislature, of further duties and obligations of a nature and character similar to those already taken, — in this case the care of a larger sum of money than usual, of the same nature and from the same source as that which the officer was otherwise bound to care for.

ACTION upon the official bond of one Jackson as loan commissioner of St. Lawrence County, for loaning moneys deposited with the state. It appeared that by the act of April 10, 1850, the commissioners were given charge of a sum of five hundred dollars more than that which they had charge of at the time of their appointment. It was claimed that for loss by reason of the increase of liability the principals were not liable. The opinion states the facts.

J. H. Martindale, for the appellant.

J. C. Brown, for the respondent.

By Court, GROVER, J. Judgment of nonsuit in the previous action was no bar: *Brintnall v. Foster*, 7 Wend. 103; *Audubon v. Exchange Insurance Co.*, 27 N. Y. 216. Such was always the rule in actions at law. In equity suits the rule is different; a decree dismissing the complaint, unless made without prejudice, bars a second suit for the same cause.

The real question in this case is, whether the addition made to the capital of the fund placed in charge of the commissioners by the act of April 10, 1850, discharged the sureties upon their official bonds. An examination of that act will show that it contains no provision effecting such a result, unless it is produced by this addition thereby made to the capital of the fund. This presents a question of vast importance to the public; it not only affects all the official bonds of all this class of commissioners, holding office at the time of the passage of the act, but on examination into the matter, would, I think, show that it affected a great number of official bonds in other cases. This consideration cannot change the law, if settled in favor of the sureties, but the obvious inconvenience of a rule working such results requires a thorough examination of the reasons and authority upon which it is claimed to be established.

As between private parties, the law is, that any alteration in the obligation or contract, in respect of which a person has become surety, without the consent of the latter, extinguishes his obligations and discharges him: *Burge on Surety*, 214; *Theobald on Principal and Surety*, sec. 132; *Whitcher v. Hall*, 5 Barn. & C. 269; and this result follows irrespective of the inquiry whether the alteration could work any injury to the surety or not: *Bangs v. Strong*, 4 N. Y. 315 [42 Am. Dec. 64]. The reason upon which this rule is founded is, that the surety has never made the contract upon which it is sought to charge him. His answer is, if it is sought to charge him upon the altered contract, that he never made any such bargain; and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency, the answer furnishes a complete defense.

It is claimed by the defendants that the same rule is applicable to official bonds. In this they are right, if the reasons apply, and the same answers can be given. An official bond is a contract with the people for the faithful discharge of the official duties of the officer. In the present case, it was that

Jackson should faithfully discharge the duties of said commissioner, pursuant to the act entitled "An act authorizing a loan of certain moneys belonging to the United States, deposited with the state of New York for safe-keeping," and should discharge his said duties without favor, malice, or partiality. These duties Jackson has not performed, but the sureties claim to be discharged on the ground that subsequent to the making of the bond five hundred dollars was added to the capital of the fund. The duties of the commissioner as to this five hundred dollars were precisely the same as required for the capital of the fund, and precisely those required by the act referred to in the bond. The position of the defendants must go to the extent that any alteration made by the legislature in the act affecting the duties of the commissioner will discharge his sureties. In other words, that the bond is to be regarded as a contract faithfully to discharge the duties of the office as then prescribed by the act, and that any alteration in these duties, made by the legislature subsequently, alters the contract, and hence discharges the sureties. If this position be sound, it follows that no change can be made by the legislature relative to the amount of money in their hands, the mode of loaning it, their compensation, or their duties in any respect, without discharging their official bonds.

It may be remarked that it would not only relieve the sureties upon the bond, but the officer himself, unless it should be held that his continuance in office, after the passage of the act making the change, was an assent on his part to such change. The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter, no alteration can be made without the mutual assent of both parties. In the former, the legislature have power at any and all times to change the duties of officers, and the continued existence of this power is known to the officer and his sureties; and the officer accepts the office, and the sureties execute the bond, with this knowledge. It is, I think, the same in effect as though this power was recited in the bond. Had this been done, it would not be claimed that the sureties were discharged by its exercise. If an individual had given a guaranty of the faithful performance of a contract by one party, containing a clause authorizing the other to make alterations in certain of its provisions, it would not be claimed that the surety was discharged by alterations so authorized; and yet this is nothing more than the sureties knew the legis-

lature were competent to do in the present case. Why has it never been claimed in behalf of officers who had given bonds for the discharge of their official duties that a contract had been made with them in relation thereto unchangeable by the legislature? Simply because it is understood that all these acts are subordinate to the law-making power, and necessarily subject to such changes as may from time to time be deemed expedient. Every official oath is so interpreted. It is not true that one taking an oath to discharge the duties of any office simply swears to discharge them as then prescribed by law; but that he swears to discharge them as they may from time to time be fixed and regulated by the law-making power. So an official bond conditioned for the discharge of the duties of the office should in like manner be understood, not as restricted to duties as then prescribed by law, but as embracing the duties of the office as from time to time fixed and regulated by the legislature.

It may be said that although such might be the general rule, yet that the bond in the present case contains a reference to the act, and requires the duties to be performed in accordance therewith. To this it may be answered that section 3 of the act providing for giving the bond and its requisites requires no such reference, and that the bond in suit, in addition thereto, contains all required; that is, the true and faithful performance of its duties without favor, malice, or partiality. The act does not prescribe the amount of money to be placed in or which shall remain in the hands of the commissioners. In the absence of authority determining the question otherwise, my conviction is, that any alteration, addition, or diminution of the duties of a public officer made by the legislature does not discharge his official bond or the sureties thereon so long as the duties required are the appropriate functions of the particular officer; that all such alterations are within the contemplation of the parties executing the bond; that imposing duties of another description, and not appropriate to the office, would discharge sureties not coming within such contemplation.

The question was regarded by the supreme court as settled in favor of the sureties by a series of decisions. If this be so, it is equally binding upon this as upon any other court. No case holding any such doctrine has been decided by the courts of this state; neither the opinion of the learned justice nor the brief of counsel contain any reference to any case in this state where the point has been involved, nor have I been able

to find any such case. *Bonar v. McDonald*, 3 H. L. Cas. 226, was a case between private parties, a bank and its agent, where the duties and responsibilities of the latter were increased by the bank, and has therefore no application to the present case. The same may be said of *Northwestern Railway Company v. Whinray*, 10 Ex. 77, a contract between the company and its agent. In *Oswald v. Mayor etc. of Berwick-upon-Tweed*, 3 El. & B. 653, S. C., 5 H. L. Cas. 856, the question was, whether the bond embraced a new appointment to the office. *Lambert v. Attorney-General*, Parker, 277, was the case of a new deputation, new security given for the additional duty. *Pybus v. Gibb*, 6 El. & B. 902, is the only case where the question presented for judgment in the present case was directly involved. In that, it was held that the sureties of a bailiff of a county court were discharged on the ground that his powers had been enlarged and his responsibilities increased. The court do not appear to have considered the point whether there was not a well-grounded distinction between official bonds and contracts of private parties.

There have been several cases in this country where it has been held that a subsequent change of the duties of an officer do not discharge his sureties. In *White v. Fox*, 22 Me. 341, it was held that a change in the duties of a clerk of the court did not discharge his sureties, the court saying that the sureties were bound for the faithful discharge of the duties of the office; that is, for the faithful discharge of such duties as the laws for the time being should require to be performed by the clerks of judicial courts; and further, that there was but little similarity between such cases and those arising out of offices or trusts regulated by contract. In *People v. McHatton*, 2 Gilm. 638, it was held that a legislative extension of the time for paying over the taxes of three weeks did not discharge the sureties of the officer. *State v. Carlton*, 1 Gill, 249, is a similar case. In *Kindle v. State*, 7 Blackf. 586, a similar rule was applied, where the time for payment by a county treasurer was extended. In *Colter v. Morgan*, 12 B. Mon. 278, it was held that the sureties were bound, although the taxes were increased after the giving of the bond. In *Marney v. State*, 13 Mo. 7, it was held that sureties of a sheriff were bound for the performance of new duties created after giving the bond. In *Bartlett v. Governor*, 2 Bibb, 586, a similar ruling was made. Other similar cases might be cited, but those already cited I think sufficient to show that a legislative altera-

tion of the duties of an officer do not discharge his sureties so long as the duties remain appropriate to the office. My conclusion is, that the judgment should be reversed, and a new trial ordered, with costs to abide event.

HUNT, J., filed a concurring opinion. After stating the facts, he said, in substance, as follows: The position to which Jackson was appointed was a public office. His chief duty was to receive and invest certain moneys intrusted to his care by the state. The act passed subsequent to his appointment, providing for the placing of an additional sum in his charge, which was to be subject to the same regulations, and to be disposed of in the same way, as the other moneys in his charge, did not in any way alter the nature, character, or duties of his office; it was an additional amount of duty in every particular of the same nature as that already existing, which was imposed upon his office. It was even enacted that the new securities should form a part of the fund in his hands, making it a part of the original subject so far as the legislative power could make it so. In the language of the court in *Rochester Bank v. Elwood*, 21 N. Y. 92, this "was within the range of the class of duties that might properly be assigned" to such an officer. It was not like the case of *Bonar v. McDonald*, 3 H. L. Cas. 226, where a clerk was employed at a certain salary, on condition that he should embark in no kind of business or adventure, and the defendants having become his sureties for the faithful performance of his duties, he afterwards undertook with his employers, in consideration of a larger salary, to bear a share of the losses incurred in discounts obtained by him. This was a new agreement, changing entirely the character of the business in which he was engaged, and so changed the character of the sureties' liabilities as to discharge them altogether. So in *Northwestern Ry Co. v. Whinray*, 10 Ex. 77, where the bond of a clerk recited that the liability should continue while he should be clerk at a certain salary, it was held that a change by his employers, substituting a commission on sales in place of the salary, released the sureties. In *Pylus v. Gibbs*, 6 El. & B. 903, it was held that sureties of the bailiff of a county court were discharged where his powers and responsibilities were enlarged and increased by adding to the jurisdiction of the court bankruptcy cases, which would authorize the arrest of absconding debtors, and by increasing the amount over which the court might exercise jurisdiction. The court say that the nature of the office was so changed as to affect the liability of the surety to his prejudice, and that he was discharged. I cannot approve the doctrine of *Bartlett v. Attorney-General*, Parker, 277, where it was held that a person who had become a surety for a collector of customs was not liable in respect to customs first imposed seven years after his appointment and the giving of the bond. Such a rule would annul the bond of every collecting officer whenever a change was made in rates or duties.

The true rule is, that the surety shall be liable for the faithful performance by the principal of all the duties of the office during the term of his appointment, and not of duties as they exist at any particular moment. His duties may vary, and whatever the statute imposes or withdraws, becomes or ceases to be a part of his duty. The only limitation is, that the duties imposed shall be of the same general nature and character: *White v. Fox*, 22 Me. 341, and the additional duties in this case were such.

The case of *United States v. Kirkpatrick*, 9 Wheat. 720, is in apparent conflict with the views stated, but an examination of the case will show that it

may be sustained upon its own facts, and so far as it conflicts with the rule which we have stated, I find that it has never been recognized or affirmed, and I cannot consider it sound. The view I have taken of this question is sustained by *Skillett v. Fletcher*, L. R. 1 C. P. 217; S. C., 2 Id. 469. In this case, collectors of poor-rates, and also of sewer and general rates, were constituted collectors also of a new drainage rate. It was held that the sureties upon the bonds of such officers were not discharged by the increase of duties imposed upon them.

But if the increase of duties involved an increased peril to the surety, why should he be discharged entirely? Would not the rule be that he would be discharged only as to liabilities arising from the additional duties? In the case before us no new or substituted contract is made, but the original contract or duty remains in force, and the new law merely imposes additional duties. In *Bonar v. McDonald*, 3 H. L. Cas. 226, the original contract of employment was canceled, and an entirely new one made, to which the sureties were not parties. So, in *Northwestern Ry Co. v. Whinray*, 10 Ex. 77, and *Pybus v. Gibbs*, 6 El. & B. 902, and *Miller v. Stewart*, 9 Wheat. 680. *Oswald v. Mayor*, 3 El. & B. 652, is not in point, for in that case the liability was held to exist, notwithstanding a change in the tenure of the office, on the ground that the bond so expressly provided. In the following cases sureties were held liable in cases like the one under discussion, and the position I have taken is sustained: *Coulter v. Morgan*, 12 B. Mon. 278; *Marney v. State*, 13 Mo. 7; *Bartlett v. Governor*, 2 Bibb, 586; *Walker v. Chapman*, 22 Ala. 46; *Graham v. Washington Co.*, 9 Dana, 184; *Governor v. Ridgway*, 12 Ill. 14; *Camphor v. People*, 12 Id. 290.

EFFECT OF LEGISLATIVE ALTERATION OF DUTIES OF OFFICER TO DISCHARGE SURETIES UPON HIS BOND. — The general principle to be deduced from the cases is, that a legislative alteration of the duties of an officer do not discharge his sureties so long as the duties remain appropriate to the office. An official bond is a contract with the people for the faithful discharge of the official duties of the officer. The general form of the obligation is, that the surety will be responsible for any failure of the officer to faithfully discharge the official duties of his office. It has been contended by the counsel in a number of cases that the rule applied to bonds between private parties, whereby any alteration in the obligation or contract, without consent of the surety, operates to discharge him from further liability, should be as well applicable to official bonds. The distinction which should be made is well stated in a late New York case, *Supervisors v. Clark*, 92 N. Y. 391. It is said in this case that private parties do not contract with reference to any change in the obligation, and that the understanding between them always is that any such change without consent of the surety will operate to discharge him. On the other hand, the parties to official bonds, in contracting for the faithful performance of an officer's duties, do so with reference to the acknowledged power of the legislature to vary and change the power and duties of the officer. The question the determination of which is the main purpose of this note is, what changes in the duties of an officer, by the legislature, will, and what will not, operate to discharge his sureties. In the case just cited, *Supervisors v. Clark*, the rule given is, that unless the general nature or functions of the office be altered, or the territorial jurisdiction of the officer be enlarged or entirely changed, the surety will not be discharged, and that in any event the surety will remain bound for the due performance of the original duties of the office under the law in force when the bond was given.

While legislation changing the nature of the office will discharge the surety to the extent of the change, that which merely increases the *quantum* of responsibilities or duties will not have such an effect. In *White v. Fox*, 22 Me. 341, the statute changed the duties of court clerks. Their duties as changed, however, were still all properly duties of court clerks. It was held that the sureties were not affected by the change. Where, after the execution of his bond, a postmaster's duties were extended by statute so that much larger sums would come to his hands than under the former enactment, the court held that the officer's sureties were not discharged, saying that the former duties of the postmaster included the receipt of money for postages, and that the new enactment merely increased the amount of money to be so received. The court added that had the act made him the receiver of other moneys than for postages, and which it was not his duty under the old enactment to receive, his sureties would have been discharged as to such moneys: *Postmaster-General v. Munger*, 2 Paine, 199. In *Dawson v. State*, 38 Ohio St. 1, it was held that an enactment which abolished the office of city treasurer, and made it the duty of the county treasurer to receive the funds which were formerly taken charge of by the city treasurer, did not affect the liability of the sureties upon the bond of the county treasurer. The duty of the latter was the safe-keeping of money, and the new enactment operated merely to place additional money in his care. In *Denio v. State*, 60 Miss. 949, it appeared that the legislature had required the clerk of a court to collect license and docket fees, and that his duties prior to that time had not included the collection of moneys. The court held that the new duties being of a kind which were not incident to the office, the sureties were discharged from any liability in regard to such moneys, or the discharge of the duties incident to the collection thereof.

Again, in the case of *United States v. Cheeseman*, 3 Saw. 424, the sureties of a United States treasurer were sued for his delinquency as an internal revenue stamp agent. The condition of the bond was for the faithful performance of the duties of treasurer. It was held that the duties of a stamp agent were not included in those of treasurer, and that the act which imposed such duties upon the treasurer would not render the sureties liable upon such a bond for default therein.

The sureties upon an official bond, it is held, will be discharged by legislation subsequent to the execution of the bond, which enlarges or entirely changes the territorial jurisdiction of the officer. In a case in the United States supreme court, it appeared that the officer had given a bond as tax collector for eight townships. By legislation, another township was added to his district. The court held that the sureties would be discharged; but went further than some cases, in saying that the contract was entirely extinguished, and that the sureties would not be bound even for the performance of the original duty: *Miller v. Stewart*, 9 Wheat. 680. For cases holding that an addition to the duties of an office, though of a different kind, will not discharge the sureties from liability for the performance of the original duty, see *Supervisors v. Clark*, 92 N. Y. 391; *Gausson v. United States*, 97 U. S. 584; *United States v. Kirkpatrick*, 9 Wheat. 720.

Liability of sureties upon the bond of a public officer cannot be extended by legislation extending the term of the officer: *Brown v. Lattimore*, 17 Cal. 93; *People v. Aikenhead*, 5 Id. 196. If an officer's duties are to continue until his successor is elected and qualified, the liability of his sureties, of course, continues during that period: *Id.* Legislation extending the time for accounting by a tax collector has been held not to materially change the

duties of the collector so as to release the sureties: *State v. Carlson*, 1 Gill, 249; *State v. Swinney*, 60 Miss. 39; *Prairie v. Worth*, 78 N. C. 169; *Commonwealth v. Holmes*, 25 Gratt. 771; *Commonwealth v. Smith*, 25 Id. 780. And likewise as to a county treasurer: *Kindle v. State*, 7 Blackf. 586. But the contrary has been held: *Smith v. Peoria*, 59 Ill. 412.

WOOD v. FLEET.

[36 NEW YORK, 499.]

PAROL PARTITION OF REALTY BY CO-TENANTS, IF FOLLOWED BY EXCLUSIVE POSSESSION and acts of ownership by each of them respectively, will bind them and their heirs.

SUIT for partition. The opinion states the facts.

J. J. Townsend, for the appellants.

H. J. Scudder, for the respondents.

By Court, DAVIES, C. J. This action is instituted to effect a division or partition of the real estate whereof Daniel Fleet died seised. He died intestate on the 20th of January, 1858, in possession of the premises whereof partition is sought, leaving the defendant Rebecca Fleet, his widow, the appellants, the sons of his brother James Fleet, deceased, and the respondent, his sister, him surviving, and his only heirs at law. He left no issue.

The referee before whom this action was tried found as facts: That Arnold Fleet of Oyster Bay was seised in fee of the lands, a portion of which were sought to be partitioned, and had been so seised for about fifty years before his death. The whole farm contains about 205 acres. He died August 9, 1839, intestate, leaving a widow and two sons, Daniel Fleet and James Fleet, and a daughter of Deborah, then the wife of John Wood, this respondent, his only heirs at law. On the 7th of September, 1839, Deborah Wood and her husband duly conveyed her share of said lands to her brothers Daniel and James. Before October, 1846, it was verbally agreed between Daniel and James that the farm should be divided between them, and the boundary line between them was agreed upon. It was a visible monument, viz., a fence; and it was agreed that Daniel should have as his own in severalty in fee all that part of the farm north or west of that line, and James should have as his own in fee in severalty all the part south or east of that line; but that no written instrument was executed by either party

conveying his share until shortly before Daniel's marriage. That in pursuance of this agreement, and to perform it on his part, Daniel, before his marriage, and before the month of October, 1846, at the request of James, conveyed by deed to James in fee all his, Daniel's, undivided half-interest in the part of the farm which they had agreed should belong to James in fee in severalty. That the part which it was agreed James should have contained the homestead occupied by their father, and which James and Daniel had continued to occupy until the 28th of October, 1846, when Daniel, upon his marriage, left the homestead, and resided at the house of his wife's brother, and occupied the part of the farm agreed to be held in severalty by him, cultivated and improved it, he alone controlling and managing it. That Daniel, on the faith of this agreement, erected a new dwelling-house, and made other improvements and repairs on that part of the farm thus assigned to him, at a cost of about four thousand dollars, the whole of which was borne by him alone. That these improvements were completed in November, 1848, when he and his wife moved into said new house, and continued to occupy it until his death. That Daniel alone exercised exclusive ownership over the land from the time of the final agreement for the division until his death, that his brother James, or the sons of James after the latter's death, neither claimed nor exercised any ownership over that part. That Daniel alone received all the products of the farm, claiming them as his own, no one disputing his claim, and that he applied them to his own use. James, in like manner, and his heirs after his decease, exclusively occupied the part assigned by the agreement to James, treating it in like manner as belonging exclusively to James and his heirs. The land was separately assessed to Daniel and to James, and to his heirs. In February, 1847, Daniel brought a quitclaim deed for the part assigned to him, to James, and requested him and his wife to execute it. James's wife was then unwell, and on that account the execution of the deed was postponed until she should be better, it being then promised by James and his wife that it should then be executed.

The referee found, as a matter of law, that the agreement for a partition followed out by a deed executed to James for his part by Daniel; by a demand by Daniel of a deed for his part from James; and by the exclusive occupation by each of his own part, each claiming as his alone the part agreed to be

his, and the other not disputing that claim, and each taking as his own alone the products of his own part, except where by his permission he allowed others to enjoy it, and on the faith of the agreement Daniel making valuable improvements, gave Daniel a legal title in severalty in fee to the whole of that part of the farm which, by the agreement, was to be his alone.

He also found, as matter of law, that the same acts would give an equitable title to a like extent if they did not give a legal title. And he also found, as a matter of law, that the subsequent declination of a deed by Daniel, and his subsequent declarations in his report mentioned, did not affect or impair in any way his title, or that of his heirs, to hold the same lands in severalty in fee.

The referee gave judgment, declaring the rights of the parties accordingly, and judgment thereon was affirmed at the general term.

The only question presented for adjudication upon this appeal is, whether the partition by parol, made by Daniel and James Fleet, of the farm inherited by them from their father, Arnold Fleet, followed as it was by the acts and declarations mentioned, and their heirs, was valid and binding.

Whatever may be the state of the law in England or in other states of this Union, it would seem that in this state it should not now be questioned, that a parol partition of real estate, followed by possession in accordance therewith, and the exercise of acts of exclusive ownership, is legal and binding, and should not be disturbed, but enforced and adhered to. An unbroken current of decision in this state affirms this proposition.

As early as 1804, in *Jackson v. Bradt*, 2 Caines, 174, the supreme court of this state had occasion to refer to a partition not made in accordance with the act of January 8, 1762. The sixth section of that act declares that every former division of lands of which there was a map or note in writing, under the hands of the proprietors thereof, should be a valid partition, provided such map or note be proved before a judge of the supreme court, and a true copy of such map be filed and such note recorded. It is thus seen that it was essential to give validity to the partition, that the map or note thereof should be acknowledged, and a true copy of the map and the note recorded. In that case neither of these things had been done, and a map showing the partition and a warrant to stand by it was offered in evidence and objected to, on the ground that a

copy of the map had not been filed and the note recorded. Judge Kent said: "If the condition on which all such previous partitions were declared valid was not performed, the transaction is left as it was before, and is to be considered independent of the act. The division and the deed between the proprietors, by which they covenanted to abide by it, and the separate possession taken in pursuance of that division, were sufficient to sever the tenancy in common, which consisted in nothing but a unity in possession. The parties became concluded and bound by that act, and the map and deed being proved before a competent officer, and possession having gone, accordingly they were admissible as legal evidence in the case."

In *Jackson v. Harde*, 4 Johns. 202 [4 Am. Dec. 262], decided in 1809, the precise point now under consideration was sharply presented, and decided. The head-note is: "A parol partition of land, carried into effect by possession taken by each party of his respective share, according to the partition, will be valid and binding on the parties." In that case, three owners of land, purchased by them of two other persons, agreed upon a division of the land, and the plan was chalked out upon a barn. A survey was afterwards made agreeable thereto; the parties afterwards possessed and built in severalty, according to that division. A previous partition by parol had been made, whereby the premises purchased by these three had been assigned to their vendees, Kent, C. J., said, in the opinion of the court: "The validity of the two partitions is not to be questioned. It did not require releases to make the division valid. A parol division, carried into effect by possession taken according to it, will be sufficient to sever the possession, as between tenants in common whose titles are distinct, and when the only object of the division is to ascertain the separate possession of each." This was so admitted by the court in *Jackson v. Bradt*, *supra*.

In *Jackson v. Vosburgh*, 9 Johns. 270 [6 Am. Dec. 276], decided in 1812, the court says: "There is no doubt but that when the title is admitted to have been in common, a parol partition, followed up by possession, will be valid and sufficient to hold the possession." In *Jackson v. Christman*, 4 Wend. 277, decided in 1830, a parol partition had been made of a lot of land among six devisees, the same being divided into six equal parts, and the court, in the opinion, says: "The question arises, whether the surviving brothers, who were parties to this

partition, can now deny that Johannes had an absolute estate in fee in his portion, and claim their respective shares of the same, as his survivors, under the will. The partition was of such interest or estate only as the brothers took under the will of their father. If the will gave them an absolute estate in fee, then the effect of the partition was to sever the tenancy in common in the portion allowed to each, and to give to each an exclusive estate in fee in that portion."

In *Jackson v. Livingston*, 7 Wend. 137, it was held that when a deed granted six hundred acres of land to be surveyed or taken off a large tract, and by the terms of an instrument referred to in the deed the tracts were to be divided into lots of one hundred acres each, and an election of lots was to be given by the grantees, which they subsequently made; that though by the deed the grantees became tenants in common with the owner of the tract, the election, followed up by possession, operated as a parol partition. This case was affirmed by the court of errors, and reported under the title of *Corbin v. Jackson*, 14 Wend. 619 [28 Am. Dec. 550]. It was there distinctly held that a parol partition between the grantees, followed up by actual possession, was valid and binding. The chancellor regarded the law so well settled that he did not deem it necessary to cite authority, but simply said, at the conclusion of his opinion, which was that of the court: "The parol partition between Lee (Madame D'Autremont) and Le Fevre was also valid." The same doctrine was reaffirmed in *Ryerss v. Wheeler*, 25 Wend. 434 [37 Am. Dec. 243]; and in this court, in *Baker v. Lorillard*, 4 N. Y. 257. So, also, in *Mount v. Morton*, 20 Barb. 123.

It is a misapprehension to suppose that these cases turned upon the length of time possession had been taken under the parol partition. No stress is laid upon that circumstance, in any of the opinions in the courts of this state, and that circumstance is only mentioned in one, that of *Ryerss v. Wheeler*, *supra*, by Nelson, C. J. He there regards the principle as undeniable that a partition by parol is valid, for he says: "It has been repeatedly decided in this court that a parol partition, carried into effect by possession and occupation in conformity thereto, will be binding between tenants in common, where titles are distinct, and the only object of the division is to ascertain the separate possessions." He then cites the authorities already referred to, and adds: "Here has been an acknowledged division, and occupation accordingly by the

parties for some thirty years." I do not understand that the learned judge deems this occupation for this length of time, or for any particular period of time, an essential element to the validity of a parol partition. It is mentioned, evidently, casually, as an incident, a circumstance appearing in that particular case.

It is not to be denied that the cases in Massachusetts, Pennsylvania, and Maine hold that no parol partition can be effectual, unless accompanied by deeds from one co-tenant to the other, inasmuch as, in the opinion of the courts of these states, the statute of frauds applies to such cases: *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 622]; *Porter v. Perkins*, 5 Id. 232 [4 Am. Dec. 52]; *Snively v. Luce*, 1 Watts, 69; *Gratz v. Gratz*, 4 Rawle, 411; *Gardiner Mfg. Co. v. Heald*, 5 Me. 384 [17 Am. Dec. 248]; 1 Washburn on Real Property, 450. The learned author on real property referred to, after stating the principle of these cases, says: "But although a parol partition between tenants in common may not, for the reasons stated, affect the legal title of the several owners; where it is followed by possession, in conformity with such partition, it will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his particular part." He refers to the cases in this state, already adverted to, and also to *Piatt v. Hubbell*, 5 Ohio, 243; *Keay v. Goodwin*, 16 Mass. 1; *Slice v. Derrick*, 2 Rich. 627.

In *Piatt v. Hubbell*, *supra*, it appeared that in 1814 proceedings for partition had been instituted and commissioners appointed, who made partition and their report, but no judgment was entered thereon, nor any further proceedings had; yet possession was taken in severalty in conformity with the partition reported and improvements made; and although some of the parties were infants, the division appearing to be a fair one after the lapse of several years, it was held that equity would not disturb it. The court say: "It is evident the partition was, in fact, made in 1814, between the parties, which at the time was equal, and that the adult parties took possession of their respective shares, and since then (1851), held them in severalty, built upon and improved them on the faith of its validity. This court in chancery would not disturb a parol partition originally fair, in which there had been so long acquiescence and such acts of confirmation." The acquiescence had then been about seventeen years. See also *Slice v. Derrick*, 2 Rich. 627, where it was held, in the case of

a parol partition, that if actual possession had followed the partition it would have bound the parties. And in *Snively v. Luce*, 1 Watts, 69, it does not appear that separate possession was taken in pursuance of the parol partition, and the court there held an unexecuted parol partition void.

If we recur to the principles of the common law, we shall find that they are in harmony with the rules and doctrine of our courts. At common law, estates were divided into joint tenancy, coparcenary, and tenancy in common. An estate in coparcenary always arises by descent, and where the descent is cast upon females only; a tenancy in common may also be created by descent as well as by deed or will. In coparcenary the seisin of one coparcener is generally the seisin of the others, and the possession of one is the possession of all. Coparceners may sever their possession, and dissolve the estate in coparcenary by consent, or by writ of partition at common law, and at common law partition was confined to them: *Coleman v. Coleman*, 19 Pa. St. 100 [57 Am. Dec. 641]. The law of partition in respect to parceners is fully given by Lord Coke, and he calls it "cunning learning": Co. Lit., tit. Parceners, 163, 175. By the law of this state, persons who take by descent under the statute take as tenants in common, and therefore Daniel and James Fleet held the farm in question as tenants in common. At the common law, if they had been females they would have taken it as coparceners. But as estates now descend in this state to all the children equally, there is no substantial difference left between coparceners and tenants in common. The title inherited by more persons than one is in some of the states expressly declared to be tenancy in common, as in New York and New Jersey; and when it is not so declared, the effect is the same, and the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States: 4 Kent's Com. 367. By the common law, tenancy in common was created by deed or will; but in this country, it may be created by descent as well as by deed or will; and whether the estate be created by the act of the party or by descent, in either case tenants in common are deemed to have several and distinct freeholds. Each tenant is considered to be solely or severally seised of his share: Id. 367.

Tenants in common at the common law might deliver seisin to each other; but they could not convey to each other by

release, because they were not jointly seised: Bro., tit. Feoffment, pl. 45; Butler's note 80 to Co. Lit. 193 a. And Littleton saith (sec. 250, p. 169 a, and note), that "partition by agreement between parceners may be made by law between them as well by parol without deed as by deed": Note. "A partition between joint tenants without writ remains at the common law, which could not be done by parol, and so it is for the same reason by tenants in common. But if two tenants in common be, and they make partition by parol, and execute the same in severalty by livery, this is good and sufficient in law." And it is added in a note: "Between joint tenants there is a twofold privity, viz., in estate and in possession; between tenants in common there is privity only in possession." It is thus seen that at common law tenants in common might by parol make partition if the same was executed by livery, for the reason that the only privity between them was that of possession. If that was severed in a lawful manner, they each held their estates in severalty absolutely. We see, therefore, that at common law it was not necessary to render a partition between tenants in common effectual that it should be made by feoffment. The actual delivery of the possession of land was termed "livery of seisin." The actual livery was performed by entry of the feoffor upon the land with the charter or deed of feoffment, and delivering a clod, turf, or twig, or the latch of the door, in the name of seisin of all the lands contained in the deed. The charter itself was not requisite; the fee was capable of being conveyed by mere livery in the presence of the vicinage: Co. Lit. 48 a; 2 Bl. Com. 315, 316; Lit., secs. 419, 421; Co. Lit. 48 b.

Tenants in common having only privity of possession, they could, at common law, make partition by parol, if they executed the same in severalty by livery; in other words, if they make actual delivery in severalty of the possession of the land. This is the equivalent of livery of seisin. That was done in the case at bar, and it is not perceived why, at common law, the partition in the present instance would not have been good and sufficient in the law. But it is conceded that a partition by parol between coparceners is valid and binding; and, as in this country, when the estate comes to two or more by descent, no substantial difference is left between coparceners and tenants in common, it follows that what would be lawful for coparceners to do, tenants in common may do; *cessante ratione, cessat ipsa lex*. As tenants in common have

only privity of possession, and can sever that by parol, it logically follows that when such severance is made by parol, and the same is executed by the delivery of the possession, each tenant in common will thereafter hold his part assigned in severalty in fee. Such, at any rate, has been the law in this state for the last fifty years, and we see no reason for overturning it.

But if this was not so, under the circumstances appearing in this case, a court of equity would not permit this partition to be disturbed, for two sufficient reasons: 1. It has been in part executed; 2. Acquiescence on the part of both parties for now over twenty years. Allnatt on Partition, vol. 5, Law Lib., p. 20, says: "It seems, also, that a parol agreement for partition by joint tenants in fee, if in part executed, and long acquiesced in, will be enforced in equity": *Thomas v. Gyles*, 2 Vern. 233. Equity decreed that a partition by parol, even by tenant in tail, shall bind the issue, on the ground of their being in possession of the lands which came in recompense.

In *Ireland v. Rittle*, 1 Atk. 541, Mary and Susan Jackson were tenants in common, and intermarried, and their husbands, by mutual agreement, made partition by which each of them agreed to take one part thereof, which they did, and entered into possession; and Susan then held the share of the premises so divided by virtue of such partition, and Mary enjoyed her part until her death. The bill was brought, among other things, to confirm the division, and that the defendant, Susan, be restrained from proceeding at law against the plaintiff to compel a new partition. Lord Chancellor Hardwicke said: "I do admit a parol agreement of long standing, acknowledged by all the parties to have been an actual agreement, and accordingly put in execution, will be established by this court, when it appears that the persons who made such agreement had a right to contract"; but he says: "As that agreement was made by the two husbands, it could by no means bind the inheritance of the wives"; and for this reason he held the defendant, Susan, not bound by the agreement.

In *Whaley v. Dawson*, 2 Schoales & L. 367, where two tenants in common, and one who was an infant, and by his guardian joined with the other tenant in common in making partition by parol, and the infant, after attaining twenty-one years, granted leases of the entirety of his allotment, and acquiesced for seventeen years, and afterwards filed a bill for

partition, Lord Manners refused to decree one, on the ground that the plaintiff by his own acts had ratified the partition already made, and that the acquiescence, as well as certain improvements made by the lessees of the other tenant in common, on the faith of their title being in severalty, raised an equity which would estop the court from interfering to disturb what had been done, and that the plaintiff had no right to more than a conveyance in pursuance of the partition already made.

We have in the case at bar the same controlling elements, viz.: 1. Ratification of the partition by both parties; 2. Acquiescence therein by both; 3. Improvements made on the faith thereof. And the important fact, in addition, that one of the tenants in common conveyed the part assigned to the other, and the other prepared and requested a conveyance to him of the part assigned to him, and which was accidentally omitted to be executed.

To rebut the inference of acquiescence on the part of Daniel Fleet in this partition, the appellants gave evidence of the declarations of Daniel, made after the death of his brother James. I have examined them carefully, and so far from showing non-acquiescence in the partition, the inference to be drawn from them is clearly in affirmance of it. In the first place, there is an entire absence of any repudiation or dissatisfaction with the partition. Secondly, it does not appear that Daniel, at any time, set up any claim to the part of the farm assigned to James, or pretended or alleged that he had or claimed any interest in it. Thirdly, in all their conversations, he spoke of the part of the farm occupied and possessed by him as his own in severalty. Fourthly, he but stated the truth when he said to one of James's sons: "I have given your father a deed for his part, but have received none in return (for my part), and this consequently gives you (or you, as heirs of your father) a legal right to the part that I occupy." Joseph, one of James's sons, then asked him if he wished it to be so, and he said "Yes," and requested Daniel to make a will. His reply was: "Whether I make a will or not, you (that is, the heirs or sons of James) are entitled to half of this I occupy."

This evinces clearly what was in the mind of Daniel, viz.: that he owned the farm occupied by him; that having no children, if he should die intestate, one half thereof would go or descend to the sons of his brother James; and he doubtless

had in his mind, what he could not fail to know, that the other half would descend to his sister, the plaintiff, though he did not express it. It would have been none the less so if the sons of James had given a quitclaim deed to Daniel, as they proposed, and which he declined to receive. It would have been an idle ceremony, as he must plainly have seen. They were estopped from setting up any interest, as the heirs of their father, in the portion of the farm assigned on the partition to Daniel; and if Daniel died intestate, as he clearly proposed to do, the three brothers, sons of James, would take as his heirs, as Daniel himself expressed it, "to half of this I occupy." A deed from them to Daniel would not have changed the descent; and there was no significance, therefore, in the fact that Daniel, on several occasions, declined to receive one from them. Their rights, as heirs of Daniel, would have been the same if they had executed and delivered such deed, on the hypothesis that after the death of their father, James, they were entitled to and had some interest or share in the part of the farm assigned to Daniel in the partition.

The case of *Johnson v. Wilkes*, Willes, 248, is cited by the appellant's counsel as establishing the position that a parol partition is void by the statute of frauds. It was an action of covenant upon an award, where the arbitrator made an award, that a partition should be made, and did not direct that the parties should execute conveyances; held, for this defect, that the award was bad, and that no action could be maintained on the covenant for not performing the award. Chief Justice Willes said: "Since the statute of 29 Car. II., no conveyance can be but by deed. A proper conveyance is now become necessary, and for this reason the award is incomplete and not good." But a court of equity never permits the statute of frauds to be set up as an instrument to perpetrate a fraud. When one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, if the latter should refuse, it would be a fraud upon the former to suffer such refusal to prevail. It is an established rule in equity that a parol agreement, in part performed, is not within the provisions of the statute of frauds. The case of *Ryan v. Dox*, 34 N. Y. 307 [90 Am. Dec. 696], and cases there cited, are conclusive upon this point, and preclude Daniel Fleet, or those claiming under him, from setting up the statute of frauds to avoid this partition. In whatever aspect, therefore, it be regarded, the partition made between

James and Daniel is valid and binding, and the judgment of the supreme court appealed from should be affirmed, with costs.

GROVER, J. It is not necessary to the determination of the present case to decide the question whether a parol partition made by tenants in common, followed by an exclusive possession and claim of title by each of the share assigned to him, for a period less than twenty years, will sever the tenancy in common, and give to each tenant the entire title of the portion so assigned, to the exclusion of the others, for the reason that the judgment appealed from, determining that Daniel Fleet was the sole owner of the lands described in the complaint at the time of his death, should be affirmed, although it should be held that such partition, occupancy, and claim did not confer such title. The referee finds that Daniel and James Fleet owned a farm as tenants in common, embracing the land in question; that they, by parol, partitioned said lands between them, and established a boundary; that thereafter each occupied the portion allotted to him in severalty; that this occupation continued for some years; that Daniel gave to James a deed of the portion allotted to him, but did not receive a deed from James of his share. The case leaves no doubt that it was agreed that one should be given. The referee further finds that after the partition Daniel expended four thousand dollars and upwards in the erection of a house and other improvements upon his share.

That these facts gave Daniel the right to enforce the agreement for partition made by James is a proposition too clear for argument. It only remains to inquire whether, having acquired this right, he did anything to deprive himself of it. It appears that at one time he called upon James and his wife for a deed; that his right thereto was recognized by them, but the execution was deferred on account of the illness of the wife. Some time after, James and wife proposed to Daniel to give the deed, to which he replied that he had changed his mind, and did not want it. This declaration, unaccompanied by any agreement or consideration, surely could not deprive Daniel of his property, held either legally or equitably. It further appears that after the death of James, Daniel told his heirs that he had never received a deed of the land, and that they had as much interest in it as he had; that some of them offered to quitclaim to him, and he declined receiving a deed.

While these facts would preclude him or his heirs from claiming title by adverse possession after the lapse of the requisite time, they would not cancel or divest him of his title to the property.

The counsel for the appellant insists that the referee erred in finding the fact that Daniel had given a deed to James. Having taken an exception to this finding, the question is presented to this court whether there was any evidence authorizing it. It is an error of law to find a fact without any evidence which upon proper exceptions may be reviewed and corrected in this court; but whether the finding is against the weight of evidence cannot be inquired into here. An examination of the evidence has satisfied my mind that not only was there evidence in support of the finding, but that the referee was entirely correct therein. The judgment appealed from should be affirmed, with costs.

Judgment affirmed.

PAROL PARTITION BY CO-TENANTS, FOLLOWED BY EXCLUSIVE POSSESSION by each of them, will be binding upon them, and parties claiming under them: *Gibbs v. Eddy*, 22 Hun, 268; *Conkling v. Brown*, 57 Barb. 276; S. C., 8 Abb. Pr., N. S., 354, all citing the principal case.

RUSSELL v. RUSSELL.

[36 NEW YORK, 581.]

POWER VESTED IN EXECUTRIX TO SELL REALTY "AS SHE SHALL DEEM EXPEDIENT, for the best interests of the legatees," etc., is a general power in trust in which she has no interest.

POWER VESTED IN EXECUTRIX TO SELL "AS SHE MAY DEEM MOST EXPEDIENT, and for the best interests of the legatees," etc., is not well executed by the conveyance to one of the legatees of a portion of the real estate of the testator, in payment of a debt due from the testator to the legatee.

DEBTS OF DECEDENT ARE TO BE PAID FROM HIS PERSONAL ESTATE, unless that be exhausted, whereupon the real estate may be applied for that purpose under an order of the court, obtained upon a showing of the facts.

ACTION by heirs of Laban Russell, to recover certain real property alleged to have been conveyed to one of his sons by the executrix in pursuance of a debt due the said son by the decedent under a power in the decedents. The opinion states the facts.

Jesse C. Smith, for the appellant.

Henry C. Murphy, for the respondent.

By Court, HUNT, J. By his will, executed the 18th of April, 1833, the testator gave all his real and personal estate to his wife, during her life or widowhood, with remainder to his four children, and named his wife and his son William as his executors. By a codicil of September, 1842, the testator gave power to his wife, Mary Russell, to sell and dispose of his "real estate, or any part thereof, at public or private sale, as she shall deem most expedient and for the best interest of all my said legatees, in my said will named." By the expression "legatees," the testator intended to designate his four children, whom he had named in the body of the will, as those to whom "he devised and bequeathed" the residue and remainder of his estate, real and personal, after the death of his wife.

In the execution of this power of sale, the widow had no interest. It was to be executed as she should deem expedient, not for her own benefit or advantage, but for the "best interest" of those entitled to the estate after death, viz., the testator's four children, described by him as his legatees. The income only belonged to her, and the *corpus* of the estate belonged to the children exclusively. It was a general power in trust in the widow: 1 R. S. 732, secs. 77, 79, 94, 106.

Was the power well executed by the conveyance of a portion of the testator's real estate to one of his sons, in satisfaction of a debt due to him from the testator? The executrix had no power or control over the real estate, in her character of executrix. There was personal property enough for the payment of the testator's debts, without calling upon his real estate, and the real estate was not liable to that purpose until the personal had been exhausted. It was not liable, at any time, except upon the presentation of a petition to the surrogate, alleging the insufficiency of the personal estate and asking the application of the real estate to that purpose. Of such an application, all parties interested in the real estate would be entitled to notice, and they would have the right to litigate the proceeding. No such proceeding was had in the present case; this circumstance is important here in a double aspect. It shows, in the first place, that the transaction is to be sustained solely upon the ground of the execution by the widow of a power in trust; and secondly, it relieves the case from the

question of the effect of a conveyance by one co-executor or co-trustee to his associate. William H. Russell was not an executor at the time of the conveyance to him, in so far as he had not then qualified. He was not a co-trustee, inasmuch as the power in trust was given to Mrs. Russell exclusively.

The authority to Mrs. Russell to sell was, in its terms, general, unrestricted as to time, place, or circumstance, but required, however, that the transaction should be a sale, and must be based upon her conviction that such sale was in the best interest of all the legatees named in the will. In my opinion, she had no power, under this clause, to convey in settlement of a claim against the testator's estate, or in payment of a debt conceded to be due from him. The duty of the payment of debts belonged to the executor, and, as already stated, real estate could not be applied to that purpose, except upon certain proceedings being taken, which were not taken in the present case. The judge, however, finds specifically that the conveyance was made in satisfaction of a debt due from the testator to William H. Russell, and was applied to that purpose by mutual consent. By this is meant, I suppose, a mutual arrangement between the trustee and William H. Russell, and not by an arrangement with the parties here litigating. I think this was not a good execution of this power, and that, having knowledge of the trust, no title passed to William H. Russell by the deed of the 9th of March, 1853, from his mother: 1 R. S. 731, sec. 65.

In the case of *Allen v. De Witt*, 3 N. Y. 276, the executor of Simeon De Witt was empowered to sell, in this language: "I empower my executors to sell all my estate, both real and personal, not specially bequeathed or devised, in such parcels, at such times, and for such considerations as they shall judge proper, for the purpose of discharging my debts and creating funds for the support of my family, and on such sales to give the proper legal conveyances. . . . After my debts shall have been paid, the avails of my property shall be equally divided among my children." Before the testator's debts were paid, the husband of one of the daughters procured from the executors a conveyance of certain lots, and mortgaged them to the plaintiff in that suit. Nothing was paid for the land, but the husband agreed to protect the estate against the mortgage, or in default thereof, that the value of the land might be charged against his wife's distributive share in the estate. On a bill filed to foreclose the mortgage, given by the husband and wife

pursuant to this arrangement, it was held that the conveyance was not an execution of the power contained in the will, and passed no title. The sale was sought to be supported on the argument that it was, in effect, a division of the avails of the estate, and a setting apart of this parcel to the wife, in satisfaction of her claim as one of the children of the testator. It was held, however, first, that a division was only authorized after the payment of debts, while this conveyance was made before the debts were paid; and secondly, that the power required an absolute sale, for a fixed consideration, which should form a fund for the maintenance of the family, and for ultimate division.

In *Briggs v. Davis*, 20 N. Y. 15 [75 Am. Dec. 363], the grantees of land in trust for the payment of debts reconveyed to the grantor, reciting that the trusts had been executed. In fact, the debts had not all been paid. The debtor then mortgaged the land to one having no actual notice of the trust. It was held that the reconveyance, being in contravention of the trust, was void, and that the legal estate remained in the trustees.

In *Roome v. Phillips*, 27 N. Y. 357, the will directed the executor to sell and convey the real estate, "upon such terms as he may think proper, and most beneficial to the estate." It was held that this did not authorize a conveyance in fulfillment of a contract made by the testator in his lifetime. The court said: "The manner and terms of sale had been fixed by the testator before the will took effect by his death. The power does not look to the conveyance of the naked title to lands of the beneficial interest in which the testator had divested himself in his lifetime."

So stringent is the rule on this subject that even legislative action cannot avoid its effect. Thus in *Powers v. Bergen*, 6 N. Y. 359, lands had been devised to trustees, for the use of the testator's daughter for life, with remainder to her issue living at her decease, and for want of such issue, to all her grandchildren. During the life of the daughter (she having children living), a statute was passed authorizing the trustees to sell the land, pay certain expenses and liens, and invest the surplus in securities, to be held in trust, as the lands were held under the will. It was held that the act was beyond the power of the legislature, and that the trustees could give no title to lands sold in pursuance of it. See *Smith v. Brown*, 45 N. Y. 83.

I do not think that the fact that the debt is a valid one is an answer to the difficulties suggested. Whatever doubt there might have been as to its validity is removed by the finding of the judge, and I assume the existence of a valid debt. I have endeavored to show that the discharge of such an obligation belonged to the executor, and was no part of the duty of the trustee.

Neither is it an answer to place the case upon the ground that the widow, having acknowledged the receipt of three thousand dollars for this land, has rendered herself chargeable as executrix to that amount; and having paid the same amount in discharge of a valid debt, no injustice would be committed by allowing the deed to stand. This is a short cut towards justice, which tramples upon the principles of law, and confounds the distinctions between a question of power and one of convenience. If the view I have taken be sound, the trustee had no power to make the conveyance, and the fact that she is ready as executrix to account for the moneys received has no relevancy to the subject.

No title passed by the attempted execution of a power, and the estate descended to the remaindermen unaffected by her act. The judgment should be reversed, and a new trial ordered.

Judgment reversed and new trial awarded.

DAVIES, C. J., and GROVER, J., dissented.

PINDAR v. KINGS COUNTY INSURANCE COMPANY.

[36 NEW YORK, 648.]

POLICY OF INSURANCE UPON BUILDING AND STOCK OF GOODS, SUCH AS IS USUALLY KEPT in a country store, covers all articles of merchandise coming within such description, though it would include articles which will not ordinarily be insured except at special rates.

ACTION upon a policy of insurance upon plaintiff's building and a stock of goods therein, such as is usually kept in country stores. In the policy sued on, turpentine and gunpowder were designated as extrahazardous substances, constituting risks which must be specially insured against. The remaining facts appear in the opinion.

H. A. Nelson, for the respondent.

Thompson and Weeks, for the appellants.

By Court, GROVER, J The description of the goods insured by the policy were such goods as are usually kept in country stores. To determine what particular goods were covered by the policy, it was necessary to ascertain what goods were usually kept in country stores. This rendered proof of what was so kept necessary and competent; the objection to this evidence was therefore properly overruled. The evidence showed that spirits of turpentine and gunpowder were usually kept in country stores. These articles were thus brought within the description of the policy, and covered by it. It was wholly immaterial whether, when stocks of country stores were insured, it was usual to make some special agreement in relation to these articles. The inquiry was simply whether they were usually kept in country stores; not how they were insured when so kept, if at all. Aided by the proof given, the policy in question must be construed as insuring spirits of turpentine and gunpowder, together with the other goods, as much as though these articles had been specifically mentioned as insured in the policy.

In *Harper v. Albany Mutual Ins. Co.*, 17 N. Y. 194, it was held that a policy upon premises privileged for a printing-office, upon its being shown that the use of camphene was necessary in conducting the business, implied an assent by the insurer to its being kept upon the premises, for such use, although the restriction to its being kept upon the premises was similar to that as to spirits of turpentine and gunpowder in the present case, and that so keeping and using it did not avoid the policy. In *Harper v. New York Ins. Co.*, 22 N. Y. 441, a similar rule was not only held, but a majority of the court went further, and held that, although the policy contained a printed clause exempting the insurer from damage from loss sustained from camphene kept upon the premises for use, yet that this exemption did not apply to a loss from fire, caused by igniting camphene so kept, accidentally, by a lighted match.

It is not necessary to go to any such extent in the present case. We have seen that in the present case the policy, properly construed, covered gunpowder and spirits of turpentine, and when these articles are insured, a printed clause prohibiting their being kept is plainly repugnant to the written clause insuring them, and, by the authority of the cases above cited, the printed clause must be governed by the written. The policy was, therefore, not void at the time of the fire, by reason

of keeping the spirits of turpentine and gunpowder. It cannot be held that the effect of the printed clause in the present case is to except spirits of turpentine and gunpowder from the general description of the property insured, without overruling *Harper v. Albany Ins. Co.* and *Harper v. New York Ins. Co.*, *supra*. The insurer is presumed to have known what articles were usually kept in country stores, and consequently, that the policy covered the powder and turpentine.

The court properly held that the opinion of the witness as to the quantity of blankets that could be put in the room in question was inadmissible. It did not appear that he had ever packed blankets, or knew any more about the space required for any given quantity than any of the jurors. Though impressed with the idea that the quantity claimed and recovered for by the plaintiff could not have been put in the space in question, no relief can be given on that ground by this court. It was a mere question of fact which cannot be reviewed here. The judgment must be affirmed.

Judgment affirmed.

POLICY OF INSURANCE UPON STOCK IN TRADE is not rendered void by the fact that some of the articles of that stock, and belonging to that particular trade or business, are included within the class of articles known as hazardous, and prohibited by the policy: See *Whitmarsh v. Conway Fire Ins. Co.*, 77 Am. Dec. 414, and note; and see the principal case cited and approved on this point, in *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun, 115; *Richards v. Westchester Fire Ins. Co.*, 15 Id. 475; *Pindar v. Continental Ins. Co.*, 38 N. Y. 369.

STORY v. CONGER.

[86 NEW YORK, 673.]

PARTY CONTRACTING IN WRITING TO SELL LOT OF LAND, AND "TO CONVEY AND RELEASE the same to the vendee by a good and sufficient deed," binds himself to give a good title to such land; and when he has given such a deed in pursuance of the agreement, he cannot complain that its covenants protect the vendee from certain liens which it was verbally understood he should be liable for.

CONTRACT WILL NOT BE REFORMED WHERE NO FRAUD OR MUTUAL MISTAKE IS ALLEGED.

DEFENDANT and wife agreed in writing to sell a certain lot of land to plaintiff, and "to convey and release the same to the vendee by a good and sufficient deed." They subsequently gave a deed covenanting that the premises were free and clear of taxes and assessments. There was at the time a lien upon

the premises for taxes of the year 1849. Defendant failing to pay the amount of this tax, plaintiff did so, and sued to recover the sum so paid, with interest. Defendant answered that an understanding has been arrived at between the parties, in the course of their conversations and negotiations, that plaintiff should take the land without any warranty or personal responsibility for the title on defendant's part; that the written agreement, as already stated, was executed, and that subsequently defendant tendered a deed without covenants or warranty, but that plaintiffs objected to such a deed because it might throw suspicion on the title, and prevent a disposition of the property, stating, however, that he was satisfied with the title as he had examined it; that defendant then, and in pursuance of such representations, executed the deed as above stated. The remaining facts appear in the opinion.

James A. Seaman, for the appellant.

Charles Jones, for the respondent.

By Court, HUNT, J. Two questions are presented by the present demand for a new trial: 1. Was the defendant, by the preliminary agreement of sale, which was in writing, of the date of November 30, 1849, bound to pay the tax in question? 2. If he was not, has he stated facts enough in his answer to entitle him to the relief he desires?

In the answer this agreement of sale is set out at length. By its provision, the defendant agrees to sell to the plaintiff the property in question, for a sum specified, "and to convey and release the same to him, by a good and sufficient deed, on the fifteenth day of December, 1849." The purchaser then agrees to pay the defendant the sum of seven thousand five hundred dollars, to assume the payment of a fifteen-thousand-dollar bond and mortgage, then a lien on the premises, to procure himself to be substituted as bondsman or mortgagor therein, or to procure the indemnity of Moses Taylor against any liability to the defendant thereon.

In the case of *Burwell v. Jackson*, 9 N. Y. 535, the party had agreed "to execute, or cause to be executed, to the party of the second party, on the first day of June, 1836, a good and sufficient conveyance" of a certain lot of land in the city of Buffalo. It was held that this contract bound the vendors to convey a good title to the purchaser. Here the party contracts "to convey and release by a good and sufficient deed." I see no difference in the legal effect of these expressions. The intent

of each is, to express an obligation to transfer a good title, and whether that result is accomplished by a deed of release, or by a deed with covenants, is not important. The good title in each case is the thing to be obtained, and nothing less than an actual good title will satisfy the contract. When the defendant, therefore, executed a deed by which he covenanted that there were no arrears of taxes upon the lots conveyed, he assumed no greater liability than his preliminary agreement called for. If he had given a quitclaim deed, he would have remained liable upon his original agreement for the amount of this tax. All preliminary negotiations were merged in the written contract; he has but fulfilled that written contract, and has no occasion to ask for the interposition of the courts in his behalf.

These views render unnecessary a discussion of the second question. It is quite possible, from the allegations of the answer, that there was some misconception of the effect of the defendant's contract, and that there was some misunderstanding as to the fact of the existence of the tax in question. No fraud, however, is suggested, nor is it alleged that a mutual mistake existed on the point in question. One of these allegations is indispensable in a complaint asking for a reformation of the contract: *Nevins v. Dunlap*, 33 N. Y. 676.

Upon his own statement of the contract, the defendant has done no more than he was legally bound to do. If unjust or immoral means have been resorted to to induce him to perform that duty, there is no remedy. In its result the case stands where and as it ought to stand: *Hutchins v. Hutchins*, 7 Hill, 104; Story's Eq. Jur., sec. 203; *Randall v. Hazelton*, 12 Allen, 412, 415. Judgment should be affirmed.

Judgment affirmed.

BOCKES and PORTER, JJ., dissented.

CONTRACTS MAY BE REFORMED FOR FRAUD OR FOR MISTAKE; but if mistake is the ground of the application for reformation, a mutual error and misunderstanding must be shown, and the mistake of one party only will not be ground for relief: See *Stricker v. Tinkham*, 89 Am. Dec. 280, and note; and the citations of the principal case to this effect in *Berringer v. Schaefer*, 52 How. Pr. 70; *Moran v. McLarty*, 11 Hun, 68; *French v. Abenheim*, 20 Id. 8; *Welles v. Yates*, 44 N. Y. 529.

HENDRICKS v. STARK.

[87 NEW YORK, 103.]

DESCRIPTION IN NOTICE OF SALE OF PREMISES AS "COLLINS HOTEL" does not import, *ex vi termini*, that the walls are party-walls, or of a different character.

FAILURE OF VENDEE TO INFORM HIMSELF ON SUBJECT as to which the notice of sale was silent cannot be imputed as a wrong to the vendor, who neither said nor did anything to mislead him.

RIGHT OF ADJOINING OWNER TO USE PARTY-WALL DOES NOT CONSTITUTE SUCH ENCUMBRANCE upon the premises or defect in the title thereof as will relieve the vendee from his contract for the purchase thereof.

EQUITABLE action by the plaintiffs as executors of Henry Hendricks against the defendant, for the specific performance of a contract to purchase the premises known as the Collins Hotel, in the city of New York. The defense was, that two of the walls of the building were party-walls. The other facts necessary to an understanding of the points decided in the case are stated in the opinion.

Peckham, for the appellant.

Evarts, for the respondents.

By Court, PORTER, J. Upon the facts found by the judge, the plaintiffs are clearly entitled to the relief demanded in the complaint, and awarded in the court below. As trustees under the testator's will, they were the proprietors of the premises known as the Collins Hotel. These premises extended, in fact as well as in law, to the central lines of the respective party-walls, which substantially corresponded with the specified dimensions of the lot, and with its eastern and southern boundaries: *Eno v. Del Vecchio*, 4 Duer, 61; *Sherred v. Cisco*, 4 Sand. 480; *Thompson v. Somerville*, 16 Barb. 473; *Partridge v. Gilbert*, 15 N. Y. 614 [69 Am. Dec. 632]. There was no assertion of title beyond these lines, either in the notice of sale or in the contract signed by the defendant.

The practice of economizing space in populous cities by the erection of buildings with party-walls is one so ancient that it would be difficult to trace its origin. The law applicable to this subject has been for centuries well settled in England, and the prevalence of a like usage in our larger towns has made the rules which govern it equally familiar here.

There was nothing in the description of the premises in question as the Collins Hotel which imported, *ex vi termini*, that the walls were of this or of a different character. The

failure of the defendant to inform himself on a subject as to which the notice of sale was silent indicates his indifference as to the particular character of the walls, and shows that he was content to buy without being at the trouble of examination or inquiry. This omission may be evidence of his own indiscretion and incaution, but it cannot be imputed as a wrong to the plaintiffs, who neither said nor did anything to mislead him. The auctioneer was not authorized to dispose of the whole or any portion of the structures on the adjacent premises, and the defendant cannot justly complain that the plaintiffs were not the owners of that which they did not assume to sell, and which was not included in his purchase.

As the title acquired by the defendant extended only to the middle of the eastern and southern party-walls, it is obvious that the mutual easement for their support was a benefit, and not a burden, to him as well as the adjacent proprietors. It was a valuable appurtenance, which passed with the title of the property, and its value to him was not diminished by the fact that it was equally beneficial to the adjacent owners: *Eno v. Del Vecchio*, 4 Duer, 53. It is manifest that the Collins Hotel would be materially diminished in value if these walls were to be so pared down as to deprive them of their present support. Their thickness does not appear, but it is fair to assume that the builder availed himself of the advantage of this mode of construction, by adding as much to the interior area of the structure as was consistent with its entire security.

It is true that the erection of a party-wall creates a community of interest between neighboring proprietors, but there is no just sense in which the reciprocal easement for its preservation can be deemed a legal encumbrance upon the property. The benefit thus secured to each is not converted into a burden by the mere fact that it is mutual, and not exclusive: *Partridge v. Gilbert*, 15 N. Y. 601 [69 Am. Dec. 632].

Even if this were otherwise, there would still be nothing in the present case to justify the court in refusing a decree in favor of the plaintiffs.

There was no failure of any substantial inducement to the contract. The defendant acquired what he proposed to buy; and he was so well satisfied with the purchase, that, after full opportunity of examination, he approved the form of the proposed conveyance, and executed a bond and mortgage for the balance of the price. Even when he concluded not to fulfill

his contract, he did not suggest the objection on which he now rests his defense. The plaintiffs tendered substantial performance of their agreement; and if the defendant really deemed it desirable to fill up part of the interior of the building with an additional thickness of wall, standing wholly on his own ground, an appropriate allowance could have been made by way of compensation. But he made no such claim; and there is no finding, as matter of fact, that the value of the premises is in any degree diminished by the reciprocal easement of which he complains. In such a case a denial of specific performance would be in contravention of the plainest rules of equity: *Winne v. Reynolds*, 6 Paige, 407; *King v. Bardeau*, 6 Johns. Ch. 37 [10 Am. Dec. 312]; *Ten Broeck v. Livingston*, 1 Id. 357. The judgment should be affirmed.

Judgment affirmed.

PARTY-WALLS: See *Hiatt v. Morris*, 78 Am. Dec. 280, note 285, where other cases are collected. A party-wall is not such an easement or encumbrance upon premises as will relieve a vendee from his contract to purchase them, although he was ignorant that the walls were party-walls when he made the contract: *Butterworth v. Crawford*, 3 Daly, 64; *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 328, both citing the principal case. The mutual easement of adjoining proprietors in a party-wall is a benefit, and not a burden: *Musgrave v. Sherwood*, 54 How. Pr. 340; *Brooks v. Curtis*, 50 N. Y. 644, both citing the principal case. Land covered by a party-wall remains the several property of the owner of each half; but the title of each owner is qualified by the easement to which the other is entitled, of supporting his building by means of the half of the wall belonging to his neighbor: *Ingalls v. Plamondon*, 75 Ill. 123, also citing the principal case.

PEOPLE v. BENNETT.

[87 NEW YORK, 117.]

OMISSIONS IN INDICTMENT WHICH ARE IN COMMON UNDERSTANDING IMPLIED in that which is expressed will not render the indictment invalid.

CAPTION OF INDICTMENT IS NO PART THEREOF.

GRAND JURORS NEED NOT BE NAMED IN INDICTMENT; the proper place to name them is in the caption of the indictment.

TO CONSTITUTE GOOD INDICTMENT FOR LARCENY, THING STOLEN MUST BE CHARGED TO BE PROPERTY OF ACTUAL OWNER, or of a person having a special property as bailee, and from whose possession it was stolen.

SUPERINTENDENT OF POOR IS MERE AGENT OF COUNTY; and if goods purchased by him for the support of the poor be stolen, the property may be laid either in the county or in him.

INHABITANT OF COUNTY IS COMPETENT TO SIT AS JUROR upon trial of person charged with larceny of the property of the county.

ERROR to the supreme court sitting in the sixth district. The defendant in error was indicted in the court of sessions of Cortland County for grand larceny in stealing from the county poor-house some hams which had been purchased for the support of the poor of the county. The first count of the indictment charged that the property was that of Alonzo W. Gates, who was at the time of the taking keeper of the poor-house, and had charge of the property. The second count laid the property in the county of Cortland. The jury found the prisoner guilty, and he was sentenced to three years' imprisonment in the penitentiary. But the supreme court reversed the judgment, and ordered the prisoner to be discharged; whereupon the district attorney sued out this writ in behalf of the people. Other facts appear from the opinion.

Reynolds, for the people.

Parker, for the defendant in error.

By Court, FULLERTON, J. After the plea of not guilty had been entered, and the trial moved by the district attorney, the counsel for the prisoner made a motion to quash the indictment, because,—1. It did not appear on the face of the indictment that it was found or presented by a grand jury; 2. Because it did not appear on its face that it was found and presented by the requisite number of grand jurors; 3. Because it was not alleged in the indictment that the grand jury were charged and sworn by the court of sessions to inquire for the people of the state of New York and for the body of the county of Cortland. These and similar objections are frequently made to the form of an indictment, and it is therefore proper to consider in the first place what constitutes a valid presentment of a grand jury.

We have inherited from England many technical rules relating to criminal practice which have long since become obsolete. They had their origin in that period of English history when the most trivial offense was punishable with death, and when it was almost a foregone conclusion, if the sword of justice was drawn, that it must be returned bathed in blood. It is not to be wondered at that humane judges should have been found in such an age willing to save life by attaching importance to objections purely technical to the form of the indictment which placed the accused on trial. An advanced civilization and a more humane administration of the law have removed the causes which gave rise to these technical rules, and there is, therefore, no good reason for re-

taining them; *cessante ratione cessat ipsa lex*. So thought our legislature when it passed the statute of jeofails, and enacted that "no indictment should be deemed invalid by reason of the omission of the defendant's title or occupation, or by a misstatement of them, or of the town or county of his residence, where the defendant shall not be prejudiced thereby," or by an omission of the words "with force and arms," or words of similar import, or by an omission to charge any offense to have been committed contrary to statute, or by reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the defendant. This statute swept away many of the objections to the forms of indictments which at times seriously interfered with an effective administration of criminal justice.

A more liberal practice began to prevail at an early day in England. Bacon says: "Some indictments have been quashed for an omission of the names of jurors, others for the want of the words 'good and lawful men,' and others for want of the words 'and then and there sworn and charged,' and others for want of the words 'to inquire for the king and for the body of the county'; yet of late years exceptions of this kind have not been much favored, especially if the indictment were in a superior court, and that which is omitted be, in common understanding, implied in what is expressed": Bac. Abr., tit. Indictment, 1. This is a sound rule, and one that is safe to follow. It does not deprive an accused party of a fair trial on the merits, nor does it, on the other hand, open an easy door for an escape on technical grounds.

Applying this rule, the form of this indictment should be considered good, if the omissions complained of are, in common understanding, implied in that which is expressed. That part of the indictment which is complained of as defective is as follows:—

"Court of Sessions, Cortland County, ss.

"The jurors of the people of the state of New York, in and for the body of the county of Cortland, upon their oaths present."

Then follow apt words charging the defendant with the commission of a larceny. Here are all the requisites of a good commencement to an indictment. It plainly appears to have been found in the court of sessions for the county of Cortland, and by the jurors of the people for said county. It is true that it does not allege that it was found by a grand jury, or

by the legal number of grand jurors, but these are plainly implied, because that body legally constituted alone have the power to present any one for trial. This has been frequently decided: *McClure v. State*, 1 Yerg. 200, *per* Catron, J. The form of this indictment is identical, *mutatis mutandis*, with that long since adopted in England, and which has obtained in most of the states in our own country. The form used in England nearly three hundred years ago was, *Juratores pro domina regina presentant quod*, etc.: West's Symboleography, pt. 2, p. 96; and it has been continued without exception to the present day.

A great deal of confusion, however, exists in the books, because the distinction between the commencement and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. "The whole question as to what a caption should contain," says Bishop, in his treatise on criminal procedure, section 154, "appears, when approached through the American books, draped in mist and girded about with darkness." Observing the proper distinction between the caption and the commencement of an indictment, no valid objection will be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the proceedings, when an indictment is removed from an inferior to a superior court. As I have already stated, the form of an indictment in many of our own states, and which form is derived from England, is thus: "The jurors of the people of the state of ——, in and for the body of the county of ——, upon their oath present," etc. This is the commencement, and all that it need contain. The caption is quite a different matter, and it had its origin in this way: Where an inferior court, in obedience to the mandate of the king's bench, transmitted the indictment to the crown office, it was accompanied with its history, naming the court where it was found, the jurors' names by whom found, and the time and place where found. All this was entered of record by the clerk of the superior court, immediately before the indictment, and was called the caption, but it was no part of the indictment itself: 1 Bishop's Crim. Proc., secs. 145, 146; 1 Starkie's Cr. Pl., 2d ed., 233. A complete form of the caption is given in Hale P. C. 165, and in 1 Chitty's Crim. Law, 327. This same practice prevailed in our state when indictments were removed from the sessions to the supreme court,

as will be seen in the case of *People v. Guernsey*, 3 Johns. Cas. 266, quoted by the respondents.

It often occurred that these captions were defective in the statement of facts sufficient to show that the inferior courts where they were found had jurisdiction. Then followed a motion in arrest of judgment, and decisions as to the requisites of a caption, viz., that it should contain an averment that the indictment to which it was prefixed was found by a grand jury of good and lawful men, giving their names, and that they had been then and there sworn and charged, etc.: See 1 Bishop's Crim. Proc., sec. 155, note 1. The same doctrine is aptly stated in 3 Burn's Justice, 372, in these words: "The caption of the indictment is no part of the indictment itself (2 Hale P. C. 166), but is the style or preamble or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove; or when the whole record is made up in form; for the record of the indictment as it stands upon the file in the court where it is taken is only thus: The jurors for our lord the king upon their oath, present." The difficulty in our practice has grown out of the error of regarding these decisions as furnishing a test of what the indictment itself should contain, rather than its caption, when removed to a superior court. The consequence is, that in some of the states there have been introduced into the commencement of an indictment the averments necessary to make a good caption, thus confounding the two: 1 Bishop's Crim. Proc., sec. 149, note 2. This has led to great diversity of practice and necessary confusion; and it will be readily seen that the decisions of such states upon these questions have no application here, for the English practice has been adopted in our own state: Barbour's Criminal Law, 280.

So far, therefore, as the objections in this case go to the form of the indictment, the latter must be considered good. Should an indictment be found in an improper manner or by an insufficient number of jurors, the way is open for redress by motion, which secures to the accused party immunity from an illegal trial or punishment: *State v. Batchelor*, 15 Mo. 207, 208; *Regina v. Hearne*, 9 Cox C. C. 433, 436, 10 Jur., N. S., 724; 4 Bla. Com. 238; Bishop's Crim. Proc., sec. 448. I pass to the consideration of the other questions arising in this case.

To constitute a good indictment for larceny, the thing stolen must be charged to be the property of the actual owner, or of a person having a special property as bailee, and from whose

possession it was stolen: 2 Arch. Cr. Proc., 7th ed., 257. He was neither the actual owner nor the bailee of the property stolen, and the first count in the indictment, therefore, failed. He was employed by the county superintendent of the poor of Cortland County at a salary. The last-named officer is clothed by statute with the power "to employ suitable persons to be keepers of the poor-houses": 2 R. S., 5th ed., 841, § 4. And it was under this power that Gates was employed. The superintendent is by the same statute authorized "to purchase materials" for the support of the paupers. It is true that in this instance the keeper purchased the property stolen with his own money; but it was an advance made for the superintendent, and he was by him subsequently, and before the larceny, reimbursed.

Neither was Gates in the actual possession of the property so as to have a special property therein. The character of his possession depends upon the tenure by which he held the property. If he were the mere servant of the actual owner, the possession was in such owner, not in him. If he were the servant, then the distinction between the charge and the possession of the property must not be overlooked. This distinction, though in ordinary language lost sight of, is necessary to be observed in dealing with the question under consideration. While no man is so high as to be above the reach of the law, no one is so low as to be beneath its protection. It is necessary, therefore, that we should observe critical distinctions in charging a man with a crime, lest his life or liberty be placed twice in jeopardy. And such a case might arise if the defendant were again indicted for the same larceny, alleging the property to be in the master. While, therefore, in the popular use of the terms, the servant is said to be in possession of the master's property, yet in contemplation of law he has the charge only. In this case Gates could have been removed at the mere caprice of the superintendent, and his possession of the property was not such that he could have maintained a civil action for it against the thief. Indeed, if he had taken the property in the manner and with the design with which the thief did, he could have been convicted of a larceny: *Coates v. People*, 4 Park. Cr. 662.

Chitty thus states the rule: "It is a clear maxim of the common law that where one has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and lar-

ceny in fraudulently converting the same to his own use. Thus a butler may commit larceny of plate in his custody, or a shepherd of sheep; the same of a servant intrusted to sell goods in a shop. This rule appears to hold universally in the case of servants, whose possession of their master's goods, by their delivery or permission, is the possession of the master himself": See *People v. Call*, 1 Denio, 123, and cases there cited. Adopting this as a rule, what practical distinction can be drawn between the relations which the butler, the shepherd, and the servant intrusted to sell goods, and their respective masters, and that which Gates bore to the superintendent who employed him? The position, therefore, that, as a mere servant, the possession of Gates was sufficient to support the allegation in the indictment cannot be maintained: *Dillenbach v. Jerome*, 7 Cow. 294; *Commonwealth v. Morse*, 14 Mass. 217.

There is another class of cases involving the possession of property much relied upon on the argument, which it is necessary to notice. They are cases where the question arose as between master and servant, where the servant was indicted for stealing from the master, and where the property stolen, though received by the servant for the master's use, had never actually passed from the latter to the former. The rule in such a case is, "that if the servant has done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like; although for many purposes, and as against third persons, this is, in law, a receipt of the goods by the master, yet it has been held otherwise, in respect of the servant himself, upon a charge of larceny at common law, in converting the goods to his own use": 2 Russell on Crimes, 4th ed., 401; 2 East P. C. 568. This rule has no application to the case under consideration.

In the second count, the property was alleged to be in the county of Cortland, and it is argued that it is bad for that reason. It is claimed that the property was vested in the superintendent of the poor, as a body corporate, and that even if it were the property of the county, such property should have been alleged to be in the board of supervisors. To establish this latter proposition, the act is quoted which provides that "all acts and proceedings by and against a county, in its corporate capacity, shall be in the name of the board of supervisors of such county": 1 R. S., 5th ed., 846, sec. 3. Notwithstanding this statute, the board of supervisors, as

such, possess no corporate powers: *Brady v. Supervisors of New York*, 2 Sand. 460. The county is made a corporation by statute: 1 R. S., 5th ed., 846, sec. 1; *Brady v. Supervisors*, *supra*; and amongst its corporate powers is the right to purchase and hold such personal property as may be necessary to execute its corporate or administrative powers: Sec. 1, subd. 3. The statute designating the name in which legal proceedings by and against the county should be conducted was designed to simplify and lessen the expenses of litigation, and not to change the title of the corporation, or the name in which its property should be held.

Instances of similar legislation are not wanting. Actions by and against banks formed under the general banking law may be by or against the president thereof: 2 R. S., 5th ed., p. 560, secs. 194, 195. And a joint-stock company or association may sue and be sued in the name of its president or treasurer for the time being: 3 R. S., 5th ed., 777.

But it is contended that the title to the property stolen was vested in the superintendent of the poor, as a corporate body, he having purchased the same, in his name, for county purposes, and that it should have been so laid in the indictment. This position cannot be maintained. The office of superintendent of the poor, although invested with corporate powers, is a mere agency of the county. The person who fills the office is required to give a bond to the supervisors for the faithful discharge of his duty, and is authorized to draw, from time to time, on the county treasurer for all necessary expenses incurred in the discharge of his trust. This creates the relation of principal and agent, and in no sense can the property bought by this officer be regarded as his. Considering, however, the nature of his office, he might be regarded as having a special property in the things stolen, so as to have made it proper to allege the property as belonging to him; but, at all events, it was the property belonging to the county of Cortland, and it was proper so to charge it.

My conclusion, therefore, is, that the second count of the indictment is good, and that the judgment should be reversed.

DAVIES, C. J., read a concurring opinion. He held that the absolute owner of the property stolen was the county of Cortland, whose money was taken and applied for the purchase thereof. The cases, he said, abundantly sustain the position that an averment of ownership in the person having the actual possession and control of the thing stolen, at the time of the theft, is all that

is required. After reviewing the following cases: *Rex v. Deakin*, O. B. 1800; 2 Leach, 862, 876; 2 East C. L., c. 16, sec. 90, p. 653; *Regina v. Burdick*, 8 Car. & P. 237; *Regina v. Bird*, 9 Id. 44; *Owen v. State*, 6 Humph. 330; *Ward v. People*, 3 Hill, 395; S. C., 7 Id. 144, — he said: “We are authorized therefore to assume from these cases that Gates having the actual possession of the goods stolen, it was well laid in the indictment that he was the owner thereof; that if there could be any doubt on that subject, the county of Cortland must be conceded to have been the true owner of the property, and that a conviction upon an indictment containing two counts, one of which laid the ownership in the actual possessor of the goods stolen, and the other in the true owner, is good and should be sustained.” He said that the fact that the property stolen was the property of the county of Cortland furnished no ground of disqualification of a juror, being an inhabitant of that county, to sit on an indictment of the thief. He said the judgment of the supreme court should be reversed and that of the court of sessions of Cortland County affirmed.

HUNT and PARKER, JJ., dissented.

CAPTION IS NO PART OF INDICTMENT: See *State v. McCarty*, 54 Am. Dec. 150, note 151.

CAPTION OF INDICTMENT IS SUFFICIENTLY EXPLICIT when it states that the indictment was found at a term of the court by certain men duly impaneled, sworn, and charged as grand jurors in and for the county at that term: *Engleman v. State*, 52 Am. Dec. 494, note 499. It is sufficient if an indictment shows upon its face that the grand jury were of the number and qualification required by law: *McGarry v. People*, 2 Lans. 231, citing the principal case.

NAMES OF GRAND JURORS BY WHOM INDICTMENT IS FOUND need not be stated therein: *People v. Haynes*, 55 Barb. 452; S. C., 38 How. Pr. 371, citing the principal case; see also *State v. Dayton*, 53 Am. Dec. 270.

PROOF OF OWNERSHIP ON PROSECUTION FOR LARCENY will be made out by showing that the person alleged to be the owner had a special property in it, or that he held it in trust: *State v. Somerville*, 38 Am. Dec. 248, note 250. And where larceny is charged whenever a person has a special property in the subject of the larceny, or holds it in trust for another, ownership may be laid in either: *Phelps v. People*, 6 Hun, 424, citing the principal case. Where the property is held by an officer of the state as its agent, the state retains the special interest therein which will sustain an averment of ownership: *Phelps v. People*, 72 N. Y. 360, citing the principal case. In delivering the opinion of the court in *Brooks v. People*, 49 Id. 440, Peckham, J., said, referring to the principal case: “In a case in this court, one judge held in substance that property might be laid as in the actual possessor, and another judge held the opposite, and the point was not decided.”

THE PRINCIPAL CASE IS ALSO CITED in *Schrumpf v. People*, 14 Hun, 13, to the point that after judgment the court will deal with matters of substance, not of form; and in *Loomis v. People*, 19 Id. 603, to the point that when an indictment is removed from a superior to an inferior court, a caption thereto is unnecessary. And it is distinguished in *Gray v. People*, 21 Id. 144.

SWINNERTON v. COLUMBIAN INSURANCE COMPANY.

[87 NEW YORK, 174.]

FOLLOWING CLAUSE IN MARGIN OF POLICY OF MARINE INSURANCE ON VESSEL CONTROLS the usual terms of a printed policy: "Warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat." And a capture by authority of the Confederate States during the Rebellion is within the warranty, and relieves the insurer from responsibility.

COURTS TAKE JUDICIAL NOTICE OF MATTERS OF PUBLIC HISTORY affecting the whole people, such as the existence of a civil war and the particular acts that led to it; and the court in ascertaining such matters may resort to such documents of reference as may be at hand, and as may be worthy of confidence.

APPEAL from the general term of the superior court of the city of New York, where a judgment upon a verdict for the plaintiffs had been affirmed. The plaintiffs were part owners and insurers of the schooner *Lawrence Waterbury*. At the close of the plaintiffs' testimony, the defendants moved for a nonsuit on the ground that the evidence, in connection with the history of the times, showed that the seizure and detention of the vessel was by direction or permission of the authorities of the state of Virginia, or of the city of Norfolk, in which case they alleged the loss would fall within the exception of the policy. The court denied the motion. Defendants' counsel then offered to read in evidence the secession ordinance passed by the state of Virginia on the 17th of April, 1861. The court sustained an objection thereto as immaterial and irrelevant, but permitted it to be read for the sole purpose of fixing the date. Defendants' counsel requested the court to charge the jury that if the seizure and detention were by the authorities of the state of Virginia or the city of Norfolk, it was within the exception of the policy warranting the insurers free from loss or expense in case of seizure or detention, and that the plaintiffs were not entitled to recover. The court refused to do so, decided that there was no question for the jury, and directed a verdict for the plaintiffs.

Sherman, for the appellants.

Reynolds, for the respondents.

By Court, HUNT, J. The body of the policy on which this action is brought contains the following clause: "Touching the adventures and perils which the said *Columbian Insurance Company* is contended to bear and take upon itself in this

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voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, taking at seas, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition, or quality soever." In the margin of the policy is the following statement: "Warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat." It is clear upon authority that the recital last quoted constitutes a warranty on the part of the assured, and that it is a qualification of the obligation of the insurer contained in the covenant before cited: *Dole v. Merchants' Ins. Co.*, 51 Me. 465; *Dole v. New England Ins. Co.*, 6 Allen, 373; *Fifield v. Pennsylvania State Ins. Co.*, 47 Pa. St. 166 [86 Am. Dec. 523]; *The Prize Cases*, 2 Black, 635.

It is held in the same cases that the capture of an insured vessel by a cruiser of the so-called Confederate States is within this warranty, and relieves the insurer from liability upon the policy. These decisions were based upon the principle that when a portion of the citizens of a civil government have rebelled, established another government, resorted to arms to maintain it, and the rebellion is of such magnitude that the military and naval forces of the government have been called out to suppress it, they are to be regarded as belligerents. To create belligerent rights, it is not necessary that there should be war between separate and independent powers; they may exist between the parties to a civil war. A state of actual war may exist without a formal declaration of it by either party, and this is true both of a civil and a foreign war. A civil war exists whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open: *Prize Cases*, 2 Black, 667, 668.

It is further held, by the same authorities, that the capture of an insured vessel by an unorganized body of men, who are thieves, robbers, and pirates simply, with no pretense of authority from an organized government, does not relieve the insurer from liability under the clauses in question. I shall examine the questions arising in this case, upon this theory of the rights of the parties.

On the 21st of April, 1861, the plaintiffs' vessel was undergoing repairs in the port of Norfolk, Virginia, where she had been driven by stress of weather. On the morning of that day a body of men, thirty or forty in number, took her from the place where she was being repaired, and towed her to a wharf.

in another part of the city. Here, aided by an equal number of men on the wharf, they broke open the cabins of the vessel, filled her with stones, and took her about a mile down the river. She was towed off, amid the cheers and shouts of those on shore, and sunk at the mouth of the channel. The person conducting these operations paid no attention to the remonstrances of the master, but informed him that what he did was by authority of the state of Virginia. The master could obtain no aid from the military and no relief from the courts. It was a scene of public excitement, — as the witness terms it, of madness, — the occasion of which will appear hereafter.

Properly to appreciate the condition and rights of the parties, it is necessary to look at the state of the country on the 21st of April, 1861, when the events we have detailed occurred.

The written constitution under which the government of the United States of America was formed was adopted in 1787. At the close of the war with Great Britain, in which its independence was accomplished, the Union was composed of thirteen states. In 1861 the Union consisted of thirty-six states, possessing many rights independent of each other, and independent of the united government formed by them. Of these states, Virginia was one, South Carolina, Georgia, Mississippi, Alabama, Texas, and Florida were others. The disputes and jealousies existing between the different sections of the country, and the people of the different states, took form and shape in the autumn of the year 1860. The elections held in November of that year resulted in the choice of Abraham Lincoln as President of the United States. A portion of the Southern States, professing to consider this result, and the principles of the successful party as destructive to the institution of African slavery, then existing in those states, determined to withdraw from the Union. The right thus to withdraw had been claimed by those states for many years, whilst the claim had been steadily and uniformly denied by the Northern States.

On the 20th of December, 1860, with ostentatious defiance, the state of South Carolina, by a convention called to act upon this particular subject, declared that the ordinance of 1788, whereby the constitution of the United States was ratified, and all acts of the state of South Carolina ratifying amendments of that constitution, were repealed; and declaring that the "union now subsisting between South Carolina and other states, under the name of 'The United States of Amer-

ica,' is hereby dissolved." The raising of armies and the appointment of commissioners to proceed to Washington, to demand the delivery to that state of all forts, light-houses, and magazines within its limits, and also for the apportionment of the public debt, and a division of all the public property of the United States, immediately followed. During the months of January and February, then next, the states of Mississippi, Alabama, Louisiana, Florida, and Texas adopted ordinances to the same effect.

In the month of February, 1861, the deputies from these states assembled at Montgomery, in the state of Alabama, and organized a government upon the same general plan as the one then and now constituting the union of the states of America. They elected a president and vice-president; organized a congress, to consist of senators and members from the several states forming their nation; a cabinet of executive officers was selected; the moneys and credits of the government were issued; commissioners for foreign states were appointed; military, naval, and civil officers were designated; a national emblem was assumed; and all the forms of a permanent and an efficient government were adopted, with the name of "The Confederate States of America." The states of North Carolina, Virginia, Tennessee, Missouri, and Arkansas subsequently joined this confederacy. It is sufficient, for the purpose of deciding the legal questions before us, to say that the rebellion thus organized assumed gigantic dimensions. A war was carried on for four years, by land and by sea, between the two governments, with varied success on the part of the different armies. It terminated in the triumph of the government and the complete overthrow of the rebellion, in the spring of 1865; but not until the government had expended three thousand millions of dollars in its suppression, and three hundred thousand northern soldiers laid down their lives in thus maintaining the integrity of their government.

These subsequent and important transactions to which I have alluded so briefly are competent to be considered in determining the *status*, in the month of April, 1861, of the parties whose acts we are to consider: *Prize Cases, supra*.

When the state of South Carolina attempted its separation from the Union, its harbor contained several forts, garrisoned by United States troops. Both the soil and jurisdiction of these forts belonged to the United States, and that government declined to yield them to the repeated and urgent demands of

South Carolina. Major Robert Anderson, of the United States army, was in command of these forts, in this month of April, and had transferred his men and munitions from Fort Moultrie to Fort Sumter, both being forts within a short distance of the city of Charleston and in its harbor. General Beauregard, who had been appointed by the Confederate States a brigadier-general in their service, was in command of the troops in the city of Charleston. The refusal to surrender Fort Sumter being persisted in, that officer, on the twelfth day of April, by the special order of the Secretary of War of the Confederate States, opened fire upon the fort. The preparations for its reduction had long been in progress; seventy men only formed its garrison, and seven thousand men formed the attacking force. An unarmed vessel, loaded with provisions for the relief of the garrison, had been fired upon by the confederate authorities and compelled to abandon her purpose. After a siege of twenty-four hours, its men exhausted, its supplies consumed, and its quarters on fire, the fort was surrendered. Its commander, with his forces, marched out with the honors of war, saluting the flag of his country as it was lowered.

The news of this surrender was telegraphed to the authorities at Montgomery. In answer to the congratulations of the assembled multitude, L. Pope Walker, Secretary of War of the Confederate States, announced the intention of his government to pursue its success, and predicted that before the 1st of May following the confederate flag would float in triumph from the Washington capitol.

On the fifteenth day of April, President Lincoln issued a proclamation, reciting that the execution of the laws of the United States was obstructed in the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law, and calling forth the militia of the several states, to the number of seventy-five thousand. Within ten days thereafter the President of the Confederate States issued a proclamation that he would grant letters of marque against the commerce of the United States, and did issue many commissions of that character. This call of President Lincoln was contemptuously refused by the Southern States, but earnestly and immediately responded to by the Northern States. The men needed were at once supplied. The Sixth Regiment of Massachusetts volunteers, while passing through

the city of Baltimore, on the 19th of April, in response to the President's call, was attacked by a mob. The most of the soldiers were raw recruits, unarmed, and separated from their officers. Three of the soldiers were killed, many were severely injured, and many of the mob were killed and injured. The railroads leading to and from the city of Baltimore were torn up and blockaded; troops and supplies could only reach Washington by a circuitous route, and that city was for a time in a state of substantial blockade. The excitement created by these transactions was scarcely inferior to that caused by the attack upon Sumter. It pervaded all classes, and all sections, receiving approval or condemnation according to the position of the parties affected.

Before referring to the condition of public affairs in Virginia at the time of the capture of the vessel in question, the following extract from the southern historian of the war will illustrate the condition of the country at the close of Mr. Buchanan's administration: "When he ceased to be President on the 4th of March, 1861, seven Southern States went out of the Union; they had erected a new government; they had secured every federal fort within their limits, with two exceptions, Sumter and Pickens; they had gathered, not only munitions of war, but had obtained great additions in moral power; and although they still deplored a war between the two sections, as a 'policy detrimental to the civilized world,' they had openly and rapidly prepared for it. Fort Moultrie and Castle Pinckney had been occupied by the South Carolina troops; Fort Pulaski, the defense of Savannah, had been taken; the arsenal at Mount Vernon, Alabama, with twenty thousand stand of arms, had been seized by the Alabama troops; Fort Morgan, in Mobile Bay, had been taken; forts Jackson, St. Philip, and Pike, near New Orleans, had been captured by the Louisiana troops; the Pensacola navy-yard and forts Barrancas and McRae had been taken, and the siege of fort Pickens commenced; the Baton Rouge arsenal had been surrendered to the Louisiana troops; the New Orleans mint and custom-house had been taken; the Little Rock arsenal had been seized by the Arkansas troops; and on the 18th of February, General Twiggs had transferred the military posts and public property in Texas to the state authorities": *The Lost Cause*, by Edward A. Pollard, Trent & Co., publishers, N. Y., 1866, pp. 98, 99.

Virginia was ultimately a member of the Southern Con-

federacy, and in the desolation of her territory by contending armies, illustrated the horrors of civil war. At this time she was in active sympathy with the confederates, and at once refused to comply with President Lincoln's call for men to sustain the country. On the 17th of April the convention of the state of Virginia passed its ordinance of secession. That portion of it which required its submission to the popular vote was entirely disregarded. The state put itself in active and immediate co-operation with the Southern Confederacy. On the same day another ordinance was passed, "to call volunteers into the service of the state": Laws of Va. 1861, app. 8. The governor issued a proclamation under this ordinance, calling upon the militia to hold themselves in immediate readiness, and in reference to President Lincoln's call for men, he uses this language: "That Virginia, by a majority approaching to entire unanimity, declared at its last session that the state would consider such an exertion of force as a virtual declaration of war, to be resisted by all the force at the command of Virginia; and subsequently the state convention, now in session, reaffirmed the same policy with almost equal unanimity." In refusing to respond to this call, Governor Letcher closes his communication in these words: "You have chosen to inaugurate civil war, and we will meet it in a spirit as determined as the administration has exhibited toward the South": Ann. Reg. 1861, "Virginia."

On the day of the passage of the ordinance of secession, the printed sign "United States Court," in the custom-house building, was taken down, and the confederate flag was raised on the capitol, in which the convention was sitting. The custom-house was taken out of the hands of the United States officials, and placed under a guard of state troops. The steamships Yorktown and Jamestown (private property) were seized and put in charge of Virginia state troops: *Id.*

On the night of the 16th of April, says the historian Greeley (*American Conflict*, vol. 1, p. 471), "the channel of the Elizabeth River, near Norfolk, was obstructed by sinking two small vessels therein, with intent to preclude the passage either way of federal ships of war. The number appears to have been increased during the following nights, while a hastily collected force, under General Taliaferro, a Virginia brigadier, who reached Norfolk from Richmond on the 18th, was reported to be preparing to seize the navy-yard and federal vessels during the night of Saturday the 20th." At this

yard were the valuable steam frigate Merrimac, the Cumberland, the Germantown, Plymouth, Raritan, Columbia, Dolphin, Pennsylvania, Delaware, and Columbus, with nearly two thousand cannons, and immense quantities of arms, munitions of war, naval stores, and timber: Id. 473. On the 21st of April all these vessels were sunk or burned, and all this property destroyed by the United States authority, under the direction of Captain Paulding of the navy, to prevent its falling into the hands of the rebels. Cannons were spiked, the muskets and revolvers broken, shot and shell thrown into the water, the ships scuttled or fired, and the barracks set on fire. As soon as the United States troops had departed, a volunteer company took formal possession in the name of the state of Virginia, and raised her flag on the ruins: Id. 476.

In describing the effect upon Virginia of President Lincoln's proclamation of the 15th of April, calling for seventy-five thousand men, Mr. Pollard says: "Two days after the interview of her commissioners with President Lincoln her people were reading his call for a land force of seventy-five thousand men; and almost instantly thereafter the proud and thrilling news was flashed over the South that Virginia had redeemed the pledges she had given against coercion, and was no longer a member of the federal Union, but in a new, heart to heart, defiant union with the Confederate States of the South": *Lost Cause*, p. 116.

The same authority says that "on the 29th of April President Davis [of the Confederate States] wrote to the Confederate Congress then convoked by him: 'There are now in the field at Charleston, Pensacola, forts Morgan, Jackson, St. Philip, and Pulaski nineteen thousand men. and sixteen thousand men are now *en route* for Virginia. It is proposed to organize and hold in readiness for instant action, in view of the present exigencies of the country, an army of one hundred thousand men": Id. 117. In another place he says: "Virginia had taken her decisive step, and passed her ordinance of secession, on the seventeenth day of April. It became an immediate concern to secure for the state all the arms, munitions, ships, war-stores, and military posts within her borders which there was power to seize. Two points were of special importance, the navy-yard at Gosport (opposite to Norfolk), with its magnificent dry-dock, its huge ship-houses, shops, forges, warerooms, rope-walks, seasoned timber for ships, masts, cordage, boats, ammunition, small-arms, and

cannons. Besides all these treasures, it had lying in its waters several vessels of war. The other point was Harper's Ferry, on the Potomac River, with its armory and arsenal containing about ten thousand muskets and five thousand rifles, with machinery for the purpose of manufacturing arms, capable of turning out twenty-five thousand muskets a year": Id. 122. A large force of Virginia volunteers, to the number of two thousand five hundred, was immediately collected to attack Harper's Ferry. To prevent its falling into their hands, the garrison set fire to the arms and buildings, and escaped across the railroad bridge into Maryland. The historian above quoted says: "The retreating garrison had laid trains to blow up the workshops, but the courage and rapid movements of the Virginians extinguished them, and thus saved to their state the invaluable machinery for making muskets and rifles." This was on the eighteenth day of the same month of April.

It is impossible to shut our eyes so closely as not to see that a war had actually been commenced against the United States government before the 21st of April, 1861. The evidences I have cited are unanswerable. The formal passage of the ordinance of secession by Virginia, the immediate appointment of commissioners to the confederate government, the sinking of vessels in the channel, the presence of armed troops, the destruction of the navy-yards, the assault on Harper's Ferry, the avowed declarations of the authorities of the state that she was to range herself with her Southern allies, the concentration of military forces at Norfolk, the declaration by the officer in charge that this vessel was seized by authority of the state of Virginia, her sinking to obstruct the passage of United States vessels to this port, the shouts and applause of the people, the excitement pervading all classes, the impossibility of finding aid in the courts, — afford the strongest reason to conclude that this seizure was an act of war, and not the act of a mob. The actors were not *hostes humani generis*, nor did they act *causa lucri*. The act of the 21st of April, 1861, is to be received and passed upon as we now, in 1867, see and understand it. It doubtless had greater significance than many of its actors were aware of, and was a prelude to a contest anticipated by none: *Prize Cases*, 2 Black, 668. No declaration of war is necessary to give to individuals or to nations the rights resulting from that condition of society. It is the actual condition that produces the result, and not the presence or ab-

sence of a declaration to that effect by either party. In the contest between the United States and Mexico in 1846, the battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of the 13th of May, 1846, which recognized "a state of war as existing by the act of the republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress: *Prize Cases, supra*.

With the light reflected upon them by subsequent events, it would be absurd to say that the taking of Fort Pulaski, which was the sea-coast defense of Georgia, or the seizure of forts Jackson and St. Philip, which defended the approach to New Orleans, or the attack upon Harper's Ferry, a depot and manufactory of fire-arms, were the acts of riotous individuals simply; or to say that the surrender of General Twiggs, by which an empire in extent, an army in numbers, and a fortune in property were transferred to the rebellion, was the illegal act of an individual simply; or to say that their acceptance by the state of Texas was a private and unauthorized transaction only. Each of these acts was in pursuance of a purpose well understood. They were intended, as they were calculated, to weaken the military power of the government, and strengthen that of the states named,—to furnish the means of rebellion, and to destroy the power to suppress it.

Whether the act of seizing and destroying the plaintiff's vessel was a part of the same scheme was a question for the jury. I think proof of the ordinance of secession was competent, and that the general question of the object and character of the seizure should have been submitted to them.

I have not overlooked the objection made by the respondent to the consideration by this court, of the facts of history to which I have referred. It is objected that the case contains no evidence of the existence of a civil war; that it does not show that the mob was acting by any public authority; and that no historical proof was offered to the court, by any authentic history, that the condition of things existed, as we are all aware that it did exist, in fact. This objection I do not consider a sound one. The rule I take to be this: That matters of public history, affecting the whole people, are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the court, in ascertaining them,

resort to such documents of reference as may be at hand, and as may be worthy of confidence. Thus, in the prize cases already cited (*Prize Cases*, 2 Black, 667), the court use this language: "The actual existence of civil war is a fact in our domestic history which the court is bound to notice and to know." Knowledge of the main fact would necessarily carry with it knowledge of the particular acts of war which created that condition of things. Upon a careful reading of these cases as reported, as well as of the arguments of counsel on both sides, and of the opinion of the court, and the dissenting opinion of Judge Nelson, I see no statement that proof was made of any of the general facts of the early history of the rebellion. Particular proclamations were read, correspondence with foreign authorities was referred to, the special facts of the capture of the vessels and their circumstances were proved, and the general facts connected with the history of the country seem to have been assumed as within the judicial cognizance of the court. I have quoted the language of the court on this point, and it was not denied by counsel against whom it applied, nor doubted in a dissenting opinion, which holds that until the passage of the act of Congress of the 13th of July, 1861, but three days before the battle of the first Bull Run, no war existed in a legal sense between the armed hosts of the different sections of the country, but that it was simply "a personal war against the rebels," on the part of the President. The general language of the court is therefore entitled to full significance.

Mr. Greenleaf says, in his work on evidence (secs. 4-6): "All civilized nations, being alike members of the great families of sovereignties, may well be supposed to recognize each other's existence, and general public and external relations. The usual and appropriate symbols of nationality and sovereignty are the national flag and seal. Every sovereign, therefore, recognizes, and of course the public tribunals and functionaries of every nation take notice of, the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of state. In like manner, the law of nations, and the general usages and customs of merchants, as well as the general laws of their own country, are recognized, without proof, by the courts of all civilized nations. . . . Neither is it necessary to prove things which must have happened according to the ordinary course of nature, nor to prove the course of time, or of the heavenly bodies, nor the

ordinary public fasts and festivals, nor the coincidence of days of the week with the days of the month, nor the meaning of words in the vernacular language, nor the legal weights and measures, nor any matters of public history affecting the whole people. Courts also take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and of the local divisions of their country into states, provinces, counties, cities, towns, local parishes, or the like. . . . They will also judicially recognize the political constitution or frame of their own government, its essential political agents or public officers, sharing in its regular administration, and its essential and regular political operations and action. Thus notice is taken by all tribunals of the accession of the chief executive of the state or nation, under whose authority they act, the genuineness of his signature, the heads of department, and the principal officers of state, the election or resignation of a senator of the United States, the appointment of a cabinet minister or foreign minister, marshals, and sheriffs. . . . In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these and the like cases, where the memory of the judge is at fault, he resorts to such documents of reference as may be at hand and he may deem worthy of confidence."

In *Bank of Augusta v. Earle*, 13 Pet. 590, Chief Justice Taney says: "And it is a matter of history which this court is bound to notice, that corporations created in this country have been in the habit for many years past of making contracts in England of various kinds and to large amounts, and we have never seen a doubt suggested of the validity of these contracts."

In *Jack v. Martin*, 12 Wend. 328, the court expressed the opinion that it was warranted in taking official notice of the existence of slavery in Louisiana, as a part of the public history of the country. For other instances of what is officially noticed by the courts, I refer to *Shaw v. Tobias*, 3 N. Y. 188; *Bayard v. Smith*, 17 Wend. 88; *McCrackan v. Cholwell*, 8 N. Y. 182; *Bronson v. Wiman*, 10 Barb. 406; *Johnson v. Hudson R. Co.*, 20 N. Y. 65; S. C., 6 Duer, 633 [75 Am. Dec. 375]; *Openheim v. Leo Wolf*, 3 Sand. Ch. 571; *Chapman v. Wilber*, 6 Hill, 475; *People v. Breese*, 7 Cow. 429; *Mechanics' & F. Bank v. Gibson*, 7 Wend. 460; *Farmers' & M. Bank v. Butchers' & D.*

572 SWINNERTON v. COLUMBIAN INSURANCE CO. [New York, Bank, 16 N. Y. 125 [69 Am. Dec. 678]; *Farmers' & M. Bank v. Butchers' & D. Bank*, 14 Id. 623.

I entertain no doubt that the historical facts necessary to the decision of the case were proper for the judicial consideration of the court, without the production or offer of proof. I have cited the histories of Mr. Greeley and Mr. Pollard, not as authorities, nor because any authorities were needed, but as containing condensed and satisfactory statements of the particular facts, which were useful for the purposes of this action, and for the reason that the two historians, differing *toto cælo* in their views and feelings, give concurrent statements of the facts in question. I should not deem it necessary that any history should be cited or any proof made to show that Henry V. conquered France, or that his son lost it; that Charles I. was beheaded; that Napoleon I. established an empire and died in exile. These are facts of general history, upon the truth of which courts would hold and jurors would find, assuming their existence. It is none the less a fact in general history that Mr. Lincoln was the President of the United States, and that he was assassinated while holding that office. It is none the less true, and none the less historic, that a war between the different sections of the United States occurred, as I have recited, and that its origin in Virginia was based upon the facts I have stated. This rule is limited to no particular lapse of time, and to no particular class of facts, except that they shall be those of general history. A new trial should be ordered.

Judgment reversed, and new trial awarded.

DAVIES, C. J., and WRIGHT, J., dissented.

JUDICIAL NOTICE: See *Wells v. Jackson I. M. Co.*, 90 Am. Dec. 575; *Lanfear v. Mestier*, 89 Id. 658, note 663, where this subject is discussed at length. Courts generally take judicial notice of whatever ought to be generally known within the limits of their jurisdiction: *People v. Snyder*, 41 N. Y. 398; *Bowers v. Arnoux*, 33 N. Y. Super. Ct. 554; *Prince v. Skilkin*, 71 Me. 367, all citing the principal case. But this is as far as they have gone: *Lenahan v. People*, 3 Hun, 169; S. C., 5 Thomp. & C. 270, also citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED to these points in the following cases: Belligerent rights may exist between the parties to a civil war: *Robinson v. International L. A. S.*, 42 N. Y. 62; seizure by a vessel of the United States, by which the vessel insured was taken from the charge of the captain in command, and which occasions the loss, comes within the exception in the written policy: *Murray v. Receivers of Harmony F. & M. Ins. Co.*, 58 Barb. 19; war, civil or *inter gentes*, dissolves all partnerships between the citizens of hostile states, and converts every citizen of one hostile state into

a public enemy of the other: *Bank of New Orleans v. Matthews*, 49 N. Y. 15; war commenced when the ports of the Confederate States were blockaded under the proclamation of the President of the United States, on the 19th of April, 1861: *Burnside v. Matthews*, 54 Id. 81. In *Woods v. Wilder*, 43 Id. 167, the court say that the historical events and the acts of the national executive, in connection with the hostile relations between the government and the rebel states, which had transpired prior to the act of Congress of July 13, 1861, are detailed in the opinion in the principal case. And it is distinguished in *Dole v. New England M. M. I. Co.*, 6 Allen, 394.

WESTFIELD BANK v. CORNEN.

[37 NEW YORK, 320.]

ACT OF AGENT WHICH IS WARRANTED BY TERMS OF HIS POWER is binding upon his principal, as to all persons dealing in good faith with the agent.

NOTICE TO BANK DIRECTOR WHILE NOT ENGAGED OFFICIALLY in the business of the bank does not affect the bank.

ACTION by the plaintiffs against the defendant upon a promissory note purporting to have been made by him by his attorney, H. A. Bartlett, payable to the order of Carson and Hard, and by them indorsed to Jessup and Laffin, who indorsed it to the plaintiffs. On the trial it appeared that Bartlett was the attorney in fact for the defendant in his name, place, and stead, to sign all notes and checks, and accept all drafts in conducting his business, as then prosecuted by him in the city of New York; and that the note was, at the request of Jessup and Laffin, discounted by the plaintiffs before maturity, in the usual course of business for the benefit of Carson and Hard. The defendant offered to show that the note was made as an accommodation for Carson and Hard, and not in the usual scope of the defendant's business, and without his knowledge or consent. The court excluded the testimony so offered. It was shown that Jessup was one of the directors of the plaintiffs' bank, and that he knew the object for which the note was made, but that he had no power to direct the note to be discounted, and did not so direct. The court directed the jury to return a verdict for the plaintiffs, which they did, and the judgment entered thereon having been affirmed at general term, the defendant appealed to this court. Other facts are stated in the opinion.

Cadwallader, for the respondents.

By Court, PARKER, J. The action is brought upon a promissory note for three thousand dollars, purporting to have been made by the defendant, by his attorney, H. A. Bartlett, dated the 18th of September, 1860, payable three months from the date to the order of Carson and Hard, and by them indorsed to Jessup and Laflin, who indorsed it to the plaintiffs.

It appeared upon the trial that Bartlett, who made the note in the defendant's name, was his attorney in fact for him and in his name, place, and stead, to sign all notes and checks, and accept all drafts in conducting his business, as then prosecuted by him in the city of New York; that the note was at the request of Jessup and Laflin, discounted by the plaintiffs before maturity, in the usual course of business for the benefit of Carson and Hard.

The defendant offered to show that the note was made as an accommodation for Carson and Hard, and not in the usual scope of defendant's business, and without his knowledge or consent. This was objected to by the plaintiffs, and excluded by the court, to which ruling the defendant excepted.

It was shown that Jessup was one of the directors of the plaintiffs' bank, and that he knew the object for which the note was made, but that he had no power to direct the note to be discounted, and did not so direct.

The counsel for the defendant then renewed the same offer, on the ground that the bank had notice that the note was an accommodation note through Jessup, a director. This was objected to by plaintiffs' counsel and excluded by the court, and the defendant excepted.

When the plaintiffs rested their case, the defendant moved for a dismissal of the complaint, on the grounds, — 1. That the evidence in the case shows that the authority of the agent, Bartlett, was a special authority, and limited to the business of the defendant; 2. That there is no proof that Bartlett, in giving the note in question, acted within the scope of his agency, and had authority to give it; 3. The authority of the agent, Bartlett, being special and limited, and the defendant having offered to show the note was an accommodation note, the plaintiffs must show themselves to be *bona fide* holders.

The motion was denied, and the defendant excepted.

The defendant called Jessup as a witness, and asked him the following question: "At the time the note was made, was there another note made for the same purpose?" and subsequently diverted to the question as immaterial and irrele-

vant, and the objection was sustained; to which ruling the defendant excepted.

The following question was then put by the defendant's counsel to the witness: "Were you and Laffin, at the time the note was made, creditors of Carson and Hard?" This question was objected to by the plaintiffs' counsel as immaterial and irrelevant. The court sustained the objection, and the defendant's counsel excepted.

The evidence being closed, the defendant's counsel asked that the question whether the plaintiffs had notice that the note was an accommodation note should be submitted to the jury, and that they should be instructed that if they found the plaintiffs had such notice, then the defendant would be entitled to a verdict.

The judge refused the request, and directed the jury to find a verdict for the plaintiffs for the amount of the note and interest, to which the defendant's counsel excepted. The jury rendered a verdict for the plaintiffs for \$3,063.50, upon which judgment was entered. Upon appeal to the general term, the judgment was affirmed.

There is no doubt that the plaintiffs are *bona fide* holders of the note, for value, unless they are chargeable with notice of its being an accommodation note, by reason of notice of that fact to Jessup, a director. If they are *bona fide* holders of the note, for value, under the rule which is now well settled, they are entitled to recover against the defendant, notwithstanding the fact that his agent exceeded his authority in making it. The principle is as stated in *North River Bank v. Aymar*, 3 Hill, 262: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority."

This principle, although the case was reversed by the court for the correction of errors, has been since recognized and established by numerous cases in this court: *Farmers' Bank v. Butchers' and Drovers' Bank*, 14 N. Y. 627; S. C., 16 Id. 135 [69 Am. Dec. 678]; *Griswold v. Haven*, 25 Id. 595 [82 Am. Dec. 380]; *Exchange Bank v. Monteath*, 26 Id. 505; *Bank of New York v. Bank of Ohio*, 29 Id. 619. The note being negotiable, the maker is deemed in law to enter into a contract

with every one to whom it is afterwards negotiated, so that the plaintiffs thus stand in privity with the defendant, and are within the rule dealing in good faith with the agent, notwithstanding the payees and their immediate indorsers had notice that the agent was transcending his authority in the making of the note: *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 Id. 141 [69 Am. Dec. 678]; *Griswold v. Haven*, 25 Id. 602 [82 Am. Dec. 380].

This principle disposes of the exception to the refusal to dismiss the complaint, and brings us to an examination of the question whether notice to Jessup that the note was an accommodation note was notice to the plaintiffs. It is to be remembered that Jessup, although a director of the plaintiffs' bank, was not acting as such in the discounting of the note; and so far as was shown or offered to be shown, notice of the object for which the note was made was not given to him as such director. He was no agent of the bank in this transaction, and the rule that notice to an agent is notice to the principal does not apply.

It was said by Nelson, C. J., in *Bank of United States v. Davis*, 2 Hill (N. Y.), 463: "I agree that notice to a director or knowledge derived by him while not engaged officially in the business of the bank cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge, for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions."

This agrees with the decision of the court in *National Bank v. Norton*, 1 Hill (N. Y.), 572. In that case, one member of a firm after dissolution renewed a partnership note held by the plaintiff, without authority from or knowledge of Norton, his late copartner. Before the making of the note in question, one of the directors of the plaintiffs' bank knew of the dissolution of the firm; and the question was, whether such knowledge was notice to the plaintiff. At the circuit, it was held that it was, and the plaintiff was nonsuited. A motion was made to the court in bank on a case to set aside the nonsuit, and for a new trial, which was granted. The court says: "In the case at bar, the learned judge had proof of publishing the notice;

and actual knowledge in the director, whose duty as one of the board it was to pass on the discount and renewal of notes, and who was, therefore, to be regarded as the agent of the plaintiffs, was sufficient proof of their knowledge." In this we think he erred. The board were the agents for the purposes mentioned, and they should acquire this sort of knowledge as such, or at least the firm should show notice brought home to some other agent specially authorized by the bank, or by the course of their business to receive it: See also Angell and Ames on Corporations, secs. 307, 308, and cases cited.

In the case before us, I think the knowledge of Jessup that the note was an accommodation note was not notice of that fact to the plaintiffs.

The question put to the witness Jessup, whether at the time the note in question was made another note was made for the same purpose, and subsequently diverted to other purposes by him, was manifestly immaterial and irrelevant, and therefore properly excluded. The same is true of the question whether Jessup and Laffin were creditors of Carson and Hard at the time when the note in question was made.

There was no question to be submitted to the jury, and they were properly directed to find a verdict for the plaintiffs. The judgment should be affirmed.

Judgment affirmed.

PRINCIPAL, WHEN BOUND BY ACTS OF HIS AGENT: See *Law v. Stokes*, 90 Am. Dec. 655, note 659, where other cases are collected. The principal is bound by the acts of his agent within the scope of his apparent authority: *Marsh v. Gilbert*, 2 Hun, 61; S. C., 4 Thomp. & C. 262, citing the principal case. Where the acts of an agent are authorized by the terms of his power, such acts are binding upon the principal as to all persons dealing in good faith with the agent: *Hunt v. Chapin*, 6 Lans. 144, citing the principal case. But when a party deals with an agent who is acting under a special and limited power, he is chargeable with notice of the restriction which the principal in the instrument creating that power may have imposed upon him: *Bumsted v. Hoadley*, 11 Hun, 488; *Quinn v. Carr*, 6 Thomp. & C. 403, both citing the principal case.

NOTICE TO DIRECTOR OF CORPORATION, WHEN NOTICE TO CORPORATION, AND WHEN NOT: See *Boyd v. Chesapeake & O. C. Co.*, 79 Am. Dec. 646, note 649; *General Ins. Co. v. United States Ins. Co.*, 69 Id. 174, note 181. A corporation is not bound by the acts of its trustees acting as individuals: *Constant v. Rector etc. of St. Albans Church*, 4 Daly, 312, citing the principal case. Unofficial knowledge or acts of a director are no more operative on the corporation than those of a stranger: *Atlantic State Bank v. Savery*, 18 Hun, 41; S. C. on appeal, 82 N. Y. 308, *Getman v. Second National Bank*, 23 Hun, 503, both citing the principal case.

STEWART v. BROWN.

[37 NEW YORK, 350.]

PARTNERS ARE ENTITLED TO CLAIM BENEFIT OF EXEMPTION LAW as to property belonging to the partnership.

LANGUAGE OF EXEMPTION ACT SHOULD BE CONSTRUED in harmony with its humane and remedial purpose.

ACTION in nature of replevin, brought by the plaintiffs against the defendant, the sheriff of Allegany County, for the recovery of a pair of horses and a double harness, levied on by him under an execution against the plaintiffs as partners. The referee found that the plaintiffs were partners in the ownership of the horses and harness; that they had no other property, except a few articles of household furniture of trifling value; that each of them was a householder, and each had a family, for which he provided; and that both the plaintiffs derived their support from the use of the horses and harness, having no other means to provide for their families. There was a judgment for the plaintiffs, which was affirmed at the general term, and the defendant appealed to this court. Other facts are stated in the opinion.

Vedder, for the appellant.

Angel, for the respondent.

By Court, PORTER, J. The argument submitted for the appellant is ingenious; but its fallacy is apparent, in view of the conclusions to which it tends. If it proves anything, it is that the property of a firm is not owned by the persons who compose it, either collectively or otherwise. It certainly does not belong to any one else, and if the appellant is right, the title is in a state of abeyance. If the partners have such an ownership as subjects the property to seizure on execution, they have also such an ownership as entitles them to claim its exemption, in a case plainly falling within the terms and intent of the statute.

In the instance before us, the complaint alleges, and the answer admits, that the horses and harness in question were the property of the plaintiffs. The facts found by the referee meet all the requirements of the act, exempting from levy and sale the necessary team of "any person, being a householder, or having a family for which he provides": 4 Edm. Stat. 626. It is insisted that the clause applies only to a several owner, as the word "person" is used in the singular num-

ber. The short answer is, that by a provision in our general law, when a statute refers to any matter or person, by words importing the singular number, several matters or persons shall be deemed to be included, unless such a construction would be repugnant to the general language employed: 2 R. S. 778, sec. 11.

In respect to articles otherwise within the terms of the act, such ownership as suffices to make them subject to seizure brings them within the exemption. If each of the respondents had owned a pair of horses, both teams would have been exempt upon the state of facts found by the referee. It would be an obvious perversion of the statute to hold that the plaintiffs forfeited its protection by owning but a single team between them, used for the common support of both.

The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them; the interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity and of the probable destitution to which its loss might reduce a family dependent on him for support. The judgment should be affirmed.

Judgment affirmed.

PARTNERSHIP PROPERTY IS EXEMPT from execution the same as is individual property, under a statute which exempts to the judgment debtors specific property: *Gilman v. Williams*, 76 Am. Dec. 219. The principal case was cited, but not followed, in *Gaylord v. Imhoff*, 26 Ohio St. 326, and *In re Handlin*, 12 Nat. Bank. Reg. 53, S. C., 3 Dill. 295, to the point that members of an insolvent firm are entitled to statutory exemptions out of partnership property.

EXEMPTION LAWS ARE REMEDIAL, AND SHOULD BE LIBERALLY CONSTRUED: See *Gilman v. Williams*, 76 Am. Dec. 219, note 224; *Montague v. Richardson*, 63 Id. 173, note 177, where other cases are collected; *Cantrell v. Connor*, 6 Daly, 225; S. C., 51 How. Pr. 46, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Bartholomew v. West*, 8 Nat. Bank. Reg. 14, S. C., 2 Dill. 293, and *In re Parks*, 9 Nat. Bank. Reg. 273, to the point that when an exemption statute speaks of property owned by the debtor, it does not mean that the ownership must be of the full legal title. It is sufficient if the interest be such as may be sold on execution or subjected to the payment of debts. It is distinguished in *Brown v. Davis*, 9 Hun, 11, and *In re Blodgett*, 10 Nat. Bank. Reg. 149.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WALTON v. SUGG.

[PHILLIPS'S LAW, 98.]

CITIZEN OF NORTH CAROLINA WHO AUTHORIZES SUIT TO BE BROUGHT IN TEXAS is personally liable for costs adjudged against him, and a judgment therefor may be enforced in North Carolina as a valid foreign judgment.

PLAINTIFFS IN SUIT ARE CONSTRUCTIVELY IN COURT ALL THE WHILE to see the proceedings from the beginning to the end, and they are bound to know what was the judgment of the court without special notice.

SUIT IS NOT ENDED UNTIL COMPLETE SATISFACTION OF or discharge from the judgment of the court therein.

PROCEEDING TO RETAX COSTS IS NOT SEPARATE SUIT, but is a motion in the cause in which the costs are awarded.

SHERIFF'S FEES ARE PART OF COSTS OF SUIT.

WHERE PERSON AGAINST WHOM FOREIGN JUDGMENT WAS RENDERED is shown to have been regularly a party to the suit, no other court can, in an action on such judgment in another state, look to see whether the court ought to have rendered such a judgment, but every other court must give full faith and credit thereto.

ATTORNEY ONCE ADMITTED TO REPRESENT PARTY CANNOT BE DISCHARGED unless with the consent of the court, until the suit is ended. While his name continues on the record, the adverse party has the right to treat him as the authorized attorney, and the service of notice on him is as valid as if served on the party himself.

MOTION TO RETAX COSTS WHICH HAVE BEEN MADE OUT BY CLERK is in the nature of an appeal from his decision to the court.

DEBT on a foreign judgment. The opinion states the facts.

No counsel for the appellants.

Phillips and Battle, for the plaintiff.

By Court, READE, J. It is a fundamental principle that a party must have notice of any proceeding against him before he can be bound thereby. The defendants say they had no notice of the proceedings against them, and that therefore they are not bound.

The facts are, that the defendants instituted a suit in Texas, and failed therein, and judgment was given against them for the costs. The plaintiff was sheriff in Texas, and the present claim is for his fees as sheriff in the Texas suit, and was a part of the costs in the cause. The sheriff's fees were not taxed by the clerk in the bill of costs, as at first made out, and were retaxed, upon motion. Notice of the motion was served upon the attorneys of the plaintiffs in that suit who are the defendants in this.

1. Were the defendants entitled to special notice? They were the plaintiffs in the cause, and therefore were constructively in court all the while to see all the proceedings from the beginning to the end. And the end is not the close of the trial, but the complete satisfaction of or discharge from the judgment of the court. The sheriff's claim was not a distinct demand separate from that suit, but was incident to it, and is expressly stated in the case to be a part of the costs. And the proceeding to re-tax was not a separate suit, but was a motion in that cause. It would seem, therefore, that as the defendants in this, the plaintiffs in that, suit sought the aid of the Texas court and its officers, they were bound to know what was the judgment of the court without special notice. The judgment was that they should pay the costs; the sheriff's fees were a part of the costs; and therefore the judgment was that they should pay the sheriff's fees. And that being the judgment of the court, the failure of the clerk to make a proper memorial of it, and to tax the costs, did not alter the judgment. And upon its being brought to the notice of the court that its judgment was not properly entered by the clerk, it was the duty of the court to have the record corrected so as to make it speak the truth. It would seem, therefore, that no other court can look into the proceedings to see whether the court ought to have rendered such a judgment; but that every other court must give faith and credit to the same, if the person against whom the judgment is was regularly a party to the suit; and in regard to that, no question can arise in this case, because the defendants in this were the plaintiffs in that suit.

But suppose this were not so, then,—

2. Did the defendants have notice of the motion to retax the costs?

The defendants live in North Carolina, and the notice was served upon their attorneys in the Texas suit. The attorneys say that they were instructed by the defendants to see that the costs were reduced as much as possible, but they were not specially instructed in regard to the notice to retax. And the defendants insist that they ceased to be their attorneys when the trial ended, although they had not been expressly discharged. "The warrant of attorney continues until the end of the suit, and he may sue out and prosecute execution after judgment, and may receive the amount of the judgment and costs. Pending the suit, the client cannot change his attorney without leave of the court": 1 Arch. Pr. 27. In the case of *United States v. Curry*, 6 How. 106, in which a question was made as to the validity of a citation in a writ of error served upon the attorney in the original cause, Taney, C. J., in delivering the opinion, says: "No attorney or solicitor can withdraw his name after he has once entered it on the record, without the leave of the court. And while his name continues, there the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial with the sanction of the party, expressed or implied, to withdraw his name after the case was finally decided. For if that could be done, it would be impossible to serve the citation where the party lived in a distant country, or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

In that case the affidavit of the attorney was filed, and in that it was stated that at the time of service of notice on him he was not the attorney, but had been paid his fee and discharged, and that he so informed the marshal when he served the notice. Yet the notice was held to be sufficient. "If the opposite party wish to be present at the taxation of cost, and doubt if the other party will give him notice of it,

he may obtain from the clerk of the rules a rule to be present at the taxation. In fair practice, however, it is usual to give notice of taxation without being ruled to do so": 1 Arch. Pr. 225.

It is usually intrusted to the clerk to make out the costs, and a motion to retax is in the nature of an appeal from his decision to the court; and although the opposite party may have no such right to notice, as that it can be collaterally inquired into in another court, yet it is supposed that the court in which the motion is made will see that notice is given. In the Texas court notice was served upon the attorneys in the cause, and we cannot see that there was any error. There is no error.

Judgment affirmed.

COSTS, WHAT RECOVERABLE AS: See *Ela v. Knox*, 88 Am. Dec. 179, note 180, where this subject is discussed at length.

RIGHT OF PARTY TO CHANGE HIS ATTORNEY: See *Board of Commissioners v. Younger*, 87 Am. Dec. 164, note 166, where this subject is discussed.

FOREIGN JUDGMENTS, WHEN CONCLUSIVE: See *Rankin v. Goddard*, 89 Am. Dec. 718, note 720, where other cases are collected.

HILL v. BELL.

[PHILLIPS'S LAW, 122.]

INSTRUMENT WILL BE ESTABLISHED AS OLOGRAPH WILL, notwithstanding the fact that it has upon it an attestation clause unwitnessed.

PLACING OF OLOGRAPH BY TESTATOR AMONG HIS VALUABLE PAPERS and effects satisfies the requirements of the statute on the matter of deposit.

CLERK DOES RIGHT IN PASSING UPON AND ALLOWING DEPOSITION TO BE READ, where he finds it among the papers, with a commission unattached, and an envelope appearing to have been sealed up and afterwards broken open.

CAVEAT. The will in question, which was duly proved to be in the handwriting of the deceased, had an attestation clause, but no subscribing witnesses. After the testator's death, the paper writing propounded was found in his trunk, with valuable papers and money. The deposition of Mrs. Hill, referred to in the opinion, was found by the clerk among the papers. He also found there a commission not attached to the deposition, but which was shown to have been regularly issued. He produced an envelope directed to him as clerk, in which he thought that the commission and depositions had

been returned to him, and which had the appearance of having been sealed. The clerk passed upon the depositions, and the court permitted them to be read. There was a verdict for the propounder, and a new trial being refused, there was an appeal taken to this court.

Manly and Haughton, for the propounder.

Green and Perry, for the caveators.

By Court, BATTLE, J. The objections to the validity of the script propounded for probate as the last will and testament of William S. Ward were of two kinds: 1. That the deceased intended to make and publish it as an attested, and not as a olograph, will, and that therefore it was never so completed as to operate as a will: 2. That if it were a olograph paper, it was not found among the valuable papers and effects "of the deceased, nor was it lodged in the hands, of some person for safe-keeping."

1. The first objection is fully answered by the two cases of *Harrison v. Burgess*, 1 Hawks, 384, and *Brown v. Beaver*, 3 Jones, 516 [67 Am. Dec. 255]. In the former it was held that the fact of there being the signature of one subscribing witness to a will of land did not prevent it from being proved as a olograph will; and in the latter, that it was no objection to the probate of a script as a olograph will that it had one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses, which intent was frustrated by the fact that the second attesting witness was incompetent. The declaration made by the decedent in the present case, that he wished to obtain the subscription of witnesses to his will, though strengthened by an attestation clause, cannot be of more avail against its validity than was the actual attestation in the cases referred to. Besides, it was entirely proper in the judge to leave it to the jury to determine whether, from all the circumstances, they believed that the paper writing was deposited by the deceased among his valuable papers, with the intention that it should be his will: *Simms v. Simms*, 5 Ired. 684.

2. The second objection is equally unavailing. According to the evidence, the trunk in which the script was found had papers and effects of value, and of greater value than those in the box; and this trunk was legally in the possession of the decedent, though for the time deposited at the house of another person. The deceased did not deposit the script "in the hands" of that person for safe-keeping, but he did place it

among his own valuable papers and effects, where it was found after his death. The case of *Little v. Lockman*, 4 Jones, 494, in stating what is not a proper depository for a olograph paper, shows clearly that the one established by the testimony in the present case was just such a place as was in the contemplation of the statute: See Rev. Code, c. 119, sec. 1.

The objection made to the admissibility of Mrs. Hill's deposition cannot be sustained. There was sufficient testimony to justify the clerk in finding that there was a commission for taking the deposition, and that it had been returned to the court properly sealed up by the commissioner who took it. The clerk did right, therefore, in passing upon it and allowing it to be read: See Rev. Code, c. 31, sec. 63.

No error being found in the judgment of the superior court, it must be affirmed.

Judgment affirmed.

OLOGRAPHIC WILLS: See *Roy v. Roy's Ex'r*, 84 Am. Dec. 696, note 699; *Pena v. New Orleans and Baltimore*, 71 Id. 506, note 509, where other cases showing what is necessary to constitute an olographic will are collected. Script may be proved as an olographic will, though attested by subscribing witnesses: *Brown v. Beaver*, 67 Id. 255.

STATE v. FARROW

[PHILLIPS'S LAW, 161.]

JURY MAY INFER AND FIND EVERY INGREDIENT OF LARCENY FROM EVIDENCE of the following facts: The owner of a bucket of pease, having taken the same to market for sale, and having occasion to go some distance to inquire the price of pease, set his bucket down in a cart, which he mistook for that of a friend; when the owner of the cart, who was absent when the bucket was placed in it, was about to leave the market, he raised the bucket and asked, "Whose are they?" The defendant took the bucket, whereupon the owner of the cart told him that he must give it to the true owner when he returned. When the owner of the bucket returned, he found his bucket gone, and went after the defendant, who had placed beets and lettuce upon the bucket, and was insolent and unwilling to surrender it.

LARCENY. The jury found the defendant guilty. The facts appear from the *syllabus* and the opinion.

S. H. Rogers, attorney-general, for the state.

W. A. Wright, for the defendant.

By Court, PEARSON, C. J. There was evidence from which the jury were at liberty to infer and find every ingredient of larceny. Tony Quince had no notion of abandoning his bucket of pease. He knew the precise place where he put it, and had *animum revertendi*; so it was no more "lost" than a gentleman's hat left in the passage upon his entering the parlor, and the fact that he put it on a chair instead of a table is immaterial. So Roper's case [3 Dev. 473] cannot be made to fit.

This is no error. This will be certified to the end, etc.

There is no error.

LARCENY, WHAT CONSTITUTES: See *Garcia v. State*, 82 Am. Dec. 605, note 607, where other cases are collected.

SHELTON v. FELS.

[PHILLIPS'S LAW, 178.]

NO ONE EXCEPT DEFENDANT HIMSELF HAS RIGHT TO HAVE EXECUTION SET ASIDE which has been issued before the date to which it has been postponed by an order of record. It will not be set aside at the instance of the defendant's trustee.

MOTION to set aside an execution. Abisha Slade confessed a judgment to Fels, and at the same term this entry was made on the record: "Execution stayed by order of plaintiff until April term, 1867." Before that time arrived, Slade conveyed all his estate to Shelton, in trust for certain of his creditors, and thereupon Fels ordered execution to issue, and this was levied on Slade's lands. Shelton then moved to set the execution aside as having been issued in contravention of the above entry. The court disallowed it, and the trustee appealed. Other facts are stated in the opinion.

Ruffin, Phillips, and Battle, for the trustee.

No counsel for the defendant.

By Court, READE, J. The entry upon the docket by the plaintiff, in the suit of *Fels v. Slade* (the same in which this motion is made), of a *cesset executio*, until April term, 1867, did not annul or suspend the judgment so as to avoid a *fieri facias* issued on it: *Cody v. Quinn*, 6 Ired. 191 [44 Am. Dec. 75]. But still it was so far binding between the parties that the court would compel them to observe it. And the plaintiff Fels having had a *fieri facias* issued upon it before the expira-

tion of the time, it would have been proper for the court, upon the motion of Slade, the defendant in that suit, to set aside the execution.

Observe, we say, upon the motion of Slade; for, very clearly, no one except him could maintain the motion. And so far from this being Slade's motion, he appeared in court and protested against the motion of Shelton. Slade had the right either to insist upon or to waive the *cesset executio*, and he did the latter.

There is no error.

RIGHT OF DEFENDANT TO HAVE EXECUTION SET ASIDE: See *Kahler v. Ball*, 83 Am. Dec. 451.

STATE v. JOHNSON.

[PHILLIPS'S LAW, 186.]

PARTY WHO BY ARTIFICE AND FRAUD PROCURES DOOR OF DWELLING-HOUSE TO BE OPENED in the night-time, and immediately thereafter enters the house and commits a robbery therein, is guilty of burglary.

BURGLARY. Upon the trial, it appeared by the prisoner's confession that he and others had obtained admittance into the house of one Moore, and robbed him of money and other things, under these circumstances: Near midnight, Moore, while in bed, heard a knock and asked who was there. The prisoner replied that it was Ned. Moore then asked what he wanted, and the prisoner replied that he had a letter for him. Moore sprang out of bed, and started to the fireplace to strike a light, opening the door as he passed. As Moore was stooping at the fire, the prisoner came behind him and pinioned his arms, and then committed the robbery. Ned was shown to be a negro man, who did errands for Moore. The prisoner confessed that he had imitated Ned's voice to deceive Moore. The prisoner was found guilty, and sentenced to death. A new trial was refused, and he appealed.

S. H. Rogers, attorney-general, for the state.

No counsel for the defendant.

By Court, PEARSON, C. J. There is no error. The prisoner, by artifice and fraud, procured the door to be opened, and immediately thereafter entered. This, according to all of the authorities, amounts to a constructive breaking.

In *State v. Henry*, 9 Ired. 463, the judges were unanimous in the opinion that when the entry was made immediately after the fastening of the door was removed, or so soon thereafter as not to allow a reasonable time for shutting the door and replacing the fastening, it amounted to a breaking. In that case the door was left unfastened, and the prisoner did not enter until after the lapse of some ten or fifteen minutes. A majority of the court, being unwilling to extend the doctrine of constructive breaking, held that there was no breaking, because no case had carried the doctrine to that extent. The other member of the court thought that it was a breaking.

This opinion will be certified, to the end that judgment may be pronounced in the court below.

There is no error.

BURGLARY, WHAT IS: See *State v. Boon*, 57 Am. Dec. 555, note 557; *Hunter v. Commonwealth*, 56 Id. 121, note 123.

FLYNT v. CONRAD.

[PHILLIPS'S LAW, 190.]

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT CROP OF CORN GROWING UPON LAND at the time the land was conveyed did not pass by the deed, but was reserved by the grantor. There is a distinction in this respect between *fructus industriales* and fruit upon trees, etc., which are the spontaneous products of the earth, or its permanent fruits.

TROVER for corn. The plaintiff's testator had conveyed to the defendant a tract of land on which there was a growing crop of corn. Evidence was given of various acts and admissions showing that the crop had been reserved by the vendor. The defendant was shown to have converted it, and a demand and refusal were also shown. The judge charged the jury that a deed of land passed everything upon the land except what was legally reserved; and that a growing crop of corn could be sold by parol so as to pass the title; and could be reserved by parol so that the reservation would be binding; that if they were satisfied in this case that it was the intention of the parties at the time the deed was executed that only the land should pass, and that the growing crop should continue to be the property of the testator, the plaintiff would be entitled to recover; that the conduct and conversation of the

parties afterwards, and the occupation of the land by the testator after the deed was executed, might be considered by them as evidence of what the intention of the parties was; and that if they were not satisfied that it was the intention of the parties that the crop should be reserved, the defendant would be entitled to their verdict. There was a verdict for the plaintiff.

Gilmer and T. J. Wilson, for the plaintiff.

Bragg and W. L. Scott, for the defendant.

By Court, PEARSON, C. J. We concur in the opinion of his honor for the reasons given by him.

It is said by the court in *Brittain v. McKay*, 1 Ired. 265 [35 Am. Dec. 738]: "The law makes a pointed distinction between those profits which are the spontaneous products of the earth, or its permanent fruits, and the corn and other growth of the earth which are produced annually by labor and industry, and thence are called *fructus industriales*. The latter for most purposes are regarded as personal chattels. Upon the death of the owner of the land before they are gathered, they go to his executor, and not his heir. Upon the termination of an estate of uncertain duration, by an act other than that of the lessee, they belong to him as personal chattels, and do not go over to the owner of the soil. They are liable to be seized and sold under execution as personal chattels, and a sale of them while growing is not a sale of land, or any interest in or concerning land, under the statute of frauds, but a sale of goods."

Thus it is seen that a growing crop is regarded as a personal chattel. The statute (Rev. Code, c. 34, sec. 21) puts them on the same footing in another very important particular, and still further lessens the difference by making it larceny to steal any Indian corn, wheat, etc., growing in a field. So that the only difference now seems to be that the one never was attached to land or has been severed, whereas the other is not severed; and the legal effect of this is, that when land is conveyed the presumption is that wheat, for instance, that has been cut and remains shocked in the field does not pass with the land, whereas, if it has not been cut, the presumption is that it does pass with the land; but the presumption in either case may be rebutted by the acts and declarations of the parties. If the grantee hauls in and houses the wheat that has been cut, with the knowledge and without objection on the part of the

grantor, or if he admits that it was to belong to the grantee according to their agreement, no question would be made as to its being his property. The same acts and declarations in regard to wheat growing would rebut the presumption, and justify the inference that according to their agreement it was to remain the property of the grantor. This may be shown by parol evidence, for the statute of frauds does not apply to an agreement concerning a growing crop. Nor does the admission of parol evidence violate the rule that a deed shall not be added to, varied, or contradicted by such evidence.

In the former case the parol proof that according to the contract of sale the grantee was to have the wheat that remained shocked in the field does not add to the deed, for its purpose and effect was only to execute one part of the contract, and there is no reason why the other part may not be established by parol proof; so, and for the very same reason, in the latter case parol proof that according to the agreement the grantee was not to have the growing crop does not contradict the deed. It would be strange if the execution of one part of the agreement in the only way in which it can be executed should exclude proof and defeat the other part, for it must be borne in mind that the deed does not purport to set out the agreement.

In respect to fruit on trees and "not fallen," there is a diversity, for trees are a substantial and permanent part of the land, and a deed passing the land actually passes the trees as part thereof, and does not simply raise a presumption that it was the intention to pass them; hence, if there be a parol agreement to convey land, and to except the fruit on trees, or certain timber trees, and a deed is executed which does not except the fruit or trees, that part of the agreement in respect to them is defeated, for the statute of frauds requires it to be in writing; and even if the agreement be in writing, that part of it can only be set up by a bill in equity to reform the deed on the ground of accident or mistake in the draughtsman, for the effect of the deed is to pass the land and every substantial part of it.

Our conclusion that a growing crop differs only from a personal chattel in the circumstance of not being severed from the land, and that the presumption that it passes with the land is very slight, seems to be in accordance with the statute: Rev. Code, c. 46, sec. 63. By the common law, if one died intestate, his administrator took the growing crop as a part of

the personal estate, and the heir took the land and the trees and fruit on them as part thereof. If he made a will, the devisee took the crop under the presumption that, not being severed, it passed with the land, unless there was something in the will to rebut this presumption, in which case the executor took the crops. The statute makes the presumption the other way, to wit, that the crop does not pass with the land to the devisee, but passes to the executor as a personal chattel, unless it appears by the will that the devisee was to have it.

The doctrine that where there is a parol agreement, one part of which is carried into effect by a deed or other writing, that does not prevent the other part from being established by parol evidence, has been adopted and acted upon by our courts in several cases. *Twidy v. Saunderson*, 9 Ired. 5: A hires a negro to B, who gives a note for \$130, "being for hire of boy Evartson." A sued B for taking the boy out of the county, and offered to prove by parol that it was a part of the agreement that the boy should not be carried out of the county: held, that the evidence was properly admitted, "for the note is not a memorial of the entire agreement, but is simply execution of a part." *Manning v. Jones*, Busb. 368: A made a parol agreement to purchase a tract of land of B at an agreed price. B agreed further that he would put certain repairs on the premises. B delivered a deed to A. The repairs not being made, A brought *assumpsit*, and offered to prove the agreement by a witness: held, that the proof ought to have been received, the deed being an execution of one part of the agreement, the other having been left in parol. The proof offered was not to "add to, alter, or explain the deed."

Daughtry v. Boothe, 4 Jones, 87, presents the same question: held, that a bond given for the price of the hire of a slave, and containing other stipulations as to his treatment and management, did not exclude parol evidence of another stipulation in the agreement, to wit, that the slave was not to be taken out of the county.

There is no error.

Judgment affirmed.

WHETHER GROWING CROPS PASS BY DEED OF LAND: See *Kingsley v. Holbrook*, 86 Am. Dec. 173; *Turner v. Cool*, 85 Id. 449, note 452, where other cases are collected.

WHETHER SALE OF GROWING TREES IS SALE OF INTEREST IN LAND: See *Kingsley v. Holbrook*, 86 Am. Dec. 173, note 182, where this subject is discussed.

STANCILL v. BRANCH.

[PHILLIPS'S LAW, 306.]

DEFENDANT MAY WAIVE RIGHT TO HAVE HIS PERSONAL ESTATE LEVIED UPON before his real estate, and an attempted fraudulent conveyance of all his property by him amounts to such a waiver.

MOTION to amend a constable's return upon an execution, and for a *venditioni exponas*. The court ordered a *venditioni exponas* to issue to sell the lands levied on, and the defendant appealed. The other facts appear from the opinion.

Bragg, for the appellant.

Rogers and Batchelor, and Peebles, contra.

By Court, BATTLE, J. In the case of *Sloan v. Stanly*, 11 Ired. 627, it was decided that where an execution is about to be levied by a constable, the debtor, if he has personal property, must show it, and if he do not, the officer commits no wrong by levying on the land in the first instance. So if it do not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate. The present case differs from the one referred to in the fact that the officer knew that the debtor was in the possession of goods and chattels as well as of lands; but he was informed, and had good reason to believe, that the debtor had conveyed, or was endeavoring to convey, all his property, both real and personal, to a third person. The plaintiff in the execution had the right to test the validity of that conveyance; and we think he had the option to select which kind of property should be levied on for the purpose of trying the title. It is manifest that less difficulty would be encountered by a levy upon the land than upon the personal property of the debtor; and according to the facts stated in the constable's return, the court was authorized to grant the order for a *venditioni exponas*.

It is very certain, we think, that a debtor may, if he prefer to keep his personal property, request the officer to levy upon his land, and the officer will be justified in so doing, and stating the request in his return. So, in our opinion, an attempted fraudulent conveyance of all his property by a debtor will amount to a waiver of his right to have his personal property taken in preference to his land, and the officer may levy in the first instance upon the land, and make his reason known in his return. The right to have his personal property

taken and sold before his realty is intended as a benefit to the debtor, and there is no reason why he may not waive or forfeit it. In either case, where the facts are made known to the court in the return of the officer, the court may proceed to act upon it, and order the sale of the land for the satisfaction of the debt.

Judgment affirmed.

WAIVER OF STATUTORY RIGHT: See *Knecht v. Newcomb*, 78 Am. Dec. 186, note 190.

MCARTHUR v. JOHNSON.

[PHILLIPS'S LAW, §17.]

FOR FRAUD IN ITS FACTUM, DEED MAY BE AVOIDED AT LAW; but for fraud in the consideration of it, or in some matter collateral to it, relief can be had only in a court of equity.

WHERE ONE PROPOSES TO CONVEY TRACT OF LAND, and his brother undertakes to have the deed drawn, but without the knowledge of the grantor inserts therein a conveyance of another tract in trust for himself, and assures the vendor that it is "all right," whereupon the latter executes it without reading it or hearing it read, the conveyance of such second tract will be valid at law.

TRESPASS *quare clausum fregit*. Both parties claimed under one John L. McArthur. As part of the plaintiff's title, he introduced a deed executed under these circumstances: John L. McArthur, being about to visit the Southwest, and having contracted to sell a tract of fifty acres of land to the defendant, Angus L. McArthur, an older brother of John, suggested to him that one McCallum, who lived upon the road they were traveling, should write a power of attorney authorizing one Daniel McLean to make the necessary deed in John's absence. When they reached McCallum's, John remained in the buggy, and Angus went into the house. He returned after some time in company with McCallum, bringing a deed, which, in reply to a question by John, he said was "all right." John thereupon executed it without reading it or hearing it read. The deed included not only the fifty acres, but also another tract of twenty acres, which is the land in controversy, which it authorized McLean to convey to Angus. By virtue of various subsequent conveyances, this title to the twenty acres vested in the plaintiff. The judge charged the jury that if they believed that the execution of the power of

attorney was obtained by the fraudulent representations that it authorized a conveyance of only fifty acres of land, whilst in fact it also embraced the twenty-acre tract, it was void, at least so far as the latter tract was concerned; and that in such case no title passed to Angus L. McArthur under the subsequent conveyance by McLean to him. Verdict, not guilty.

Leitch, for the appellant.

No counsel *contra*.

By Court, BATTLE, J. The decision of this case depends upon the question whether the fraud alleged to have been practiced upon John L. McArthur, in the execution of the power of attorney to Daniel McLean, under whom the plaintiff claims, was a fraud in the *factum* of the deed, or a fraud in the consideration of it, or in some matter collateral to it. It is a well-established distinction that for a fraud of the first kind the deed may be avoided at law, while for a fraud of either of the two last kinds relief can be had only in a court of equity: *Reed v. Moore*, 3 Ired. 310; *Canoy v. Troutman*, 7 Id. 155; *Gant v. Hunsucker*, 12 Id. 254 [55 Am. Dec. 408]; *Nichols v. Holmes*, 1 Jones, 360; *Gwynn v. Hodge*, 4 Id. 168; *Logan v. Simmons*, 1 Dev. & B. 13.

An instance of fraud in the *factum* is when the grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it: See *Gant v. Hunsucker* and *Nichols v. Holmes*, *supra*. Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read: 2 Bla. Com. 304; *Manser's Case*, 2 Coke, 3. These authorities show that the party was fraudulently made to sign, seal, and deliver a different instrument from that which he intended, so that it could not be said to be his deed. Several of the cases in our reports referred to above furnish examples of what is meant by fraud in the consideration of the deed, or in the false representation of some matter or thing collateral to it. In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretense. In this category is included the case of a man who can read the instrument which he signs, seals, and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law,

though a court of equity may give relief against it. In support of this position, the authority of Sheppard's Touchstone is directly in point: "If the party that is to seal the deed can read himself, and doth not, or being an illiterate or a blind man, doth not require to hear the deed read, or the contents thereof declared; in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law; but equity may correct mistakes, frauds, etc.": See 1 Shep. Touch. 56 (30 Law Lib. 121).

While coming to the conclusion that the deed in the case now before us is not one which can be avoided at law, we are aware that a different decision was made in the case of *McKerall v. Cheek*, 2 Hawks, 343. There a sheriff's deed conveyed 300 acres of land, but it having been proved that he intended to convey only 120, and would not have executed the deed had not the courses, of which he was ignorant, been inserted in such a way as to deceive him as to the quantity, it was held that the deed was not conclusive, and that the question ought to have been left to the jury to say whether it was fraudulently obtained; for of the question of fraud a court of law had cognizance as well as a court of equity. The case was decided without argument, and no authorities are referred to in support of the opinion of the court. What is more material in lessening the authority of the case, not a word is said about the distinction between fraud in the *factum* of the deed and fraud in the consideration, or in some matter collateral to the deed. That distinction, and the reasons upon which it is founded, in assigning one kind of fraud to the jurisdiction of a court of law, and another to that of a court of equity, seems to have been first noticed and explained in this state in the case of *Logan v. Simmons*, 1 Dev. & B. 13. In that case these remarks are found: "The counsel for the plaintiff, however, insisted upon the general observation, that upon questions of fraud the jurisdiction of courts of law and equity is concurrent. In its generality that position is inaccurate. As to many and most cases it is true; but there are numerous frauds which can be alleged, investigated, and relieved against in equity only. Where a conveyance is not avoided by statute, and where the objection is grounded upon imposition in the treaty, and not upon undue and unlawful means used for obtaining the execution, the *factum*, of the particular instrument, relief in equity is most appropriate, and generally can be had there only. A court of

equity can do complete justice in such cases by holding the instrument to be a security for what was advanced upon the treaty or done under the contract, while a court of law would be in danger of doing wrong to one of the parties, at all events, by being obliged to pronounce the whole conclusively void or valid for all purposes." *McKerall v. Cheek*, *supra*, affords an instance of what would be the hardship and injustice of allowing the conveyances to be avoided at law; the sheriff's deed would not have conveyed even what the parties intended to convey; and thus innocent persons claiming under him would have been defeated of their just rights; while in a court of equity the instrument would have been avoided only as to the part of the land fraudulently inserted in it. At all events, the court of equity would not have avoided it *in toto*, but would have so molded it as to do exact justice between the respective parties. For these reasons, we are of opinion that the decision in *McKerall v. Cheek*, *supra*, cannot be sustained, and that his honor in the court below erred in following that case, instead of the principle of the more recent decisions in this court. The judgment must be reversed, and a *venire de novo* be awarded.

Venire de novo.

FRAUD WHICH WILL AVOID DEED AT LAW. — It is well settled that a deed may be vacated in a court of law for fraud in its execution; as, for example, where the deed has been misread to the party executing it. Where some imposition or circumvention has been practiced upon him, whereby he has been led to sign and seal an instrument which he never intended to sign, or where another instrument has been substituted for the one which he intended to execute, a court of common law may in such a case treat the deed as though it never had any legal existence: Boone on Real Property, sec. 289; *Bright v. Eynon*, 1 Burr. 390; *Escherick v. Traver*, 65 Ill. 379; *Thomas v. Thomas*, 1 Litt. 62; S. C., 13 Am. Dec. 220; *Pocock v. Hendricks*, 8 Gill & J. 421; *Obert v. Hammel*, 18 N. J. L. 73; *Van Valkenburgh v. Rouk*, 12 Johns. 337; *Dorr v. Munsell*, 13 Id. 430; *Franchot v. Leach*, 5 Cow. 506; *County of Schuylkill v. Copley*, 67 Pa. St. 386; *Taylor v. King*, 6 Munf. 358; S. C., 8 Am. Dec. 746; *Hartshorn v. Day*, 19 How. 211. Mr. Justice Nelson, in delivering the opinion of the court in *Hartshorn v. Day*, 19 Id. 223, said: "Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence." And Roane, J., delivering the opinion of the court in *Taylor v. King*, 6 Munf. 358, said: "Nor is there any doubt but that in a court of law a fraud may be given in evidence to vacate a deed, if the fraud relates to the execution of the instrument, as if it be misread to the party, or his signature be obtained to an instrument which he did not intend to sign." But this is the only fraud for which a deed can be avoided in a

court of law. The fraud which will avoid a deed in that forum must be in the execution of it: *Swift v. McHugh*, 9 Port. 39; *Mordecai v. Tankersly*, 1 Ala. 100; *Morris v. Harvey*, 4 Id. 300; *Rogers v. Colt*, 21 N. J. L. 713; *Wood v. Goodrich*, 9 Yerg. 266. Said Green, C. J., delivering the opinion of the court in *Rogers v. Colt*, 21 N. J. L. 713: "In an action upon a sealed instrument no fraud can be set up in a court of common law as a defense to the action, except such as relates to the execution of the instrument. The appropriate remedy is in equity." And the only fraud that can be pleaded at law to avoid a deed is fraud in its execution: *Belden v. Davies*, 2 Hall, 433; *Nicholls v. Holmes*, 1 Jones, 360; *Gwynn v. Hodge*, 4 Id. 168; *Devereux v. Burgwin*, 11 Ired. 491; *Truman v. Lore*, 14 Ohio St. 144. Fraud can be given in evidence under the plea of *non est factum* only where it relates to the execution of the instrument: *Holley v. Younge*, 27 Ala. 203; *Tribble v. Oldham*, 5 J. J. Marsh. 137; *Burrows v. Alter*, 7 Mo. 424; *Van Valkenburgh v. Rouk*, 12 Johns. 337; *Dorr v. Munsell*, 13 Id. 430; *Franchot v. Leach*, 5 Cow. 506; *Dale v. Roosevelt*, 9 Id. 307; *Armstrong v. Hall*, 1 N. J. L. 178; *Cannoy v. Troutman*, 7 Ired. 155. For fraud in obtaining the deed a court of equity alone can give relief: *Thomas v. Thomas*, 1 Litt. 62; S. C., 13 Am. Dec. 220. So if the fraud relate to transactions preceding the execution of the instrument, it cannot be averred or proved, and the remedy is in equity: *Taylor v. King*, 6 Munf. 358; S. C., 8 Am. Dec. 746. A deed of gift executed and acknowledged by one having capacity to convey cannot be avoided at law by proof that it was obtained by undue influence. The only remedy in such a case is in equity: *Clary v. Clary*, 2 Ired. 78; *Truman v. Lore*, 14 Ohio St. 144. Peck, C. J., delivering the opinion in the latter case, said: "Undue influence is classed among constructive frauds; and the only relief in such cases is in equity."

But a deed may be avoided in a court of law on the ground that it was fraudulently made with intent to defraud the creditors of the grantor. A specialty is invalidated everywhere by illegality in the consideration, that makes it void from the beginning: *Owen v. Arvis*, 26 N. J. L. 22; *Garretson v. Kane*, 27 Id. 208; *Mulford v. Peterson*, 35 Id. 127.

FRAUD IN CONSIDERATION OF SPECIALTY, or the want or failure of consideration, is not sufficient to avoid it at law. Nor can a false representation or warranty as to the quality of property sold be pleaded in discharge of a bond given for the consideration. But this rule is to be understood only as applicable where the consideration of the deed is not illegal or corrupt, so as to make the deed void from the beginning: *Holley v. Younge*, 27 Ala. 203; *Escherick v. Traver*, 65 Ill. 379; *Dickerson v. Evans*, 84 Id. 451; *Burrows v. Alter*, 7 Mo. 424; *Stryker v. Vanderbilt*, 25 N. J. L. 492; *Garretson v. Kane*, 27 Id. 208; *Baker v. Baker*, 28 Id. 13; *Leigh v. Clark*, 11 N. J. Eq. 110; *Vrooman v. Phelps*, 2 Johns. 177; *Dorland v. Sammis*, 2 Id. 179; *Dorr v. Munsell*, 13 Id. 430; *Parker v. Parmele*, 20 Id. 130; *Franchot v. Leach*, 5 Cow. 506; *Champion v. White*, 5 Id. 510; *Jackson v. Hills*, 8 Id. 290; *Dale v. Roosevelt*, 9 Id. 307; *Stevens v. Judson*, 4 Wend. 471; *Belden v. Davies*, 2 Hall, 433; *Cannoy v. Troutman*, 7 Ired. 155; *Walker v. Walker*, 13 Id. 335; *Gwynn v. Hodge*, 4 Jones, 168; *Wyche v. Macklin*, 2 Rand. 426; *Hartshorn v. Day*, 19 How. 211. In delivering the opinion of the court in *Stryker v. Vanderbilt*, 25 N. J. L. 492, Green, C. J., said: "The demurrer . . . raises the long-agitated question whether fraud in the consideration of a deed is a good defense at law. The question is not whether a court of common law has jurisdiction over questions of fraud, or power to relieve against it. That is conceded. The difficulty grows out of the familiar principle that a seal

imports a consideration, and where the contract is in itself legal, the amount or value of the consideration cannot be inquired into in a court of law; and inasmuch as an averment of fraud in the consideration of the contract necessarily involves an inquiry into the consideration upon which the deed is founded, that defense cannot be set up without a violation of a well-settled principle."

And Mr. Justice Nelson, discussing this subject in his opinion in *Hartshorn v. Day*, 19 How. 222, said: "The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and more especially where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed." So Oakley, J., in delivering the opinion of the court in *Belden v. Davies*, 2 Hall, 447, said: "The result of all these cases seems clearly to be, that when the consideration of a deed is not illegal or corrupt, so as to render it void *ab initio*, and when it is executed understandingly, and with a knowledge of its legal import and effect, no plea at law can impeach it. The party is concluded by the nature of the instrument, and cannot be permitted to aver anything against it." In *Holley v. Younge*, 27 Ala. 203, it was decided that fraudulent representations on the part of a vendee, to the effect that he would not use the deed against his covenantor, were no defense at law. And in *Garretson v. Kane*, 27 N. J. L. 208, it was held that the consideration of a bill of sale under seal cannot, in an action of trespass for taking the goods, be shown to have been fraudulent as between the parties. By the New Jersey statute of 1871, however, it has been provided that in actions in courts of law in that state, upon instruments under seal, the defendant may plead and set up as a defense therein fraud in the consideration of the contract, as fully and to all intents and purposes as if such instrument was not under seal: *Lord v. Brookfield*, 37 Id. 552. In Pennsylvania, where equity is a part of the law, fraud may be set up and relied upon as a defense in all cases: *Stubbs v. King*, 14 Serg. & R. 206. And the same is true under a system in which law and equity are administered by the same court: *Hopkins v. Beard*, 6 Cal. 664.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WINSTON v. WEBB.

[PHILLIPS'S EQUITY, 1.]

WHERE RESIDUARY FUND IS GIVEN BY WILL to the children, *nominatim*, by the testator, or where it is given to a certain number of the children to be equally divided between them, if one of them die before the testator, his or her share will lapse, but will not fall into the residue for the benefit of the others. Such lapsed residuary share must be distributed among the next of kin of the testator.

BILL to obtain instructions upon the following residuary clause in the will of Elizabeth Spellings: "All the balance of my estate of every kind I give to John Webb, Elizabeth Webb, Edward Webb, and Robert Webb, four children of L. S. and P. E. Webb." Said John Webb died unmarried before the testatrix.

- *Winston*, for the complainant.

By Court, BATTLE, J. If a residuary fund be given by will "to the children of a certain person, to be equally divided between them" as a class, and one of them die in the lifetime of the testator, his share will lapse for the benefit of the other residuary legatees: *Viner v. Francis*, 2 Cox, 190. But if such a fund be given to the children, *nominatim*, or to the six or any other number of children, to be equally divided between them, and one of the children die before the testator, his or her share will lapse, but will not fall into the residue for the benefit of the other children, whose shares, it is said, cannot be enlarged by such an event: *Johnson v. Johnson*, 3 Ired. Eq. 426; *Owen v. Owen*, 1 Atk. 494; *Page v. Page*, 2 P. Wms. 489;

Ackroyd v. Smithson, 1 Bro. C. C. 503. These cases show that that the lapsed residuary share is undisposed of by the will, and must be distributed among the next of kin. In the case of *Allison v. Allison*, 3 Jones Eq. 236, a contrary doctrine was laid down, as it had also been in England by Sir Joseph Jekyl, the master of the rolls, in the case of *Hunt v. Berkeley*, decided in the year 1731. But *Hunt v. Berkeley* was afterwards expressly referred to and overruled by the cases of *Owen v. Owen*, *supra*, and *Page v. Page*, *supra*; and the ruling in the latter cases is now considered the settled doctrine in England. In like manner, we must hold that the part of the decision in *Allison v. Allison*, *supra*, which relates to the residuary share of one of the children, that lapsed by his death in the life of the testator, cannot be sustained. In the case which is now before us, the death of one of the children and residuary legatees in the lifetime of the testatrix caused the lapse of the share intended for him; and upon the authority of the English cases, and of *Johnson v. Johnson*, *supra*, in this court, we hold that it does not go to the other residuary legatees, but to the defendant Ann Rebecca Scott, who is the sole next of kin of the testatrix. There may be a decree for an account and settlement in accordance with this opinion, the costs to be paid out of the funds in the hands of the executor.

Decree accordingly.

LAPSED LEGACIES, WHETHER FALL INTO RESIDUE or are distributed to the next of kin: *Cureton v. Massey*, 94 Am. Dec., and note treating the subject; *Bendall v. Bendall*, 60 Am. Dec. 469; *Cunningham v. Cunningham*, 68 Id. 718; *Downing v. Marshall*, 80 Id. 290; *Thayer v. Wellington*, 85 Id. 763, and notes to these cases.

THE PRINCIPAL CASE IS APPROVED AND FOLLOWED in *Hastings v. Earp*, Phill. Eq. 7, and *Twitty v. Martin*, 90 N. C. 646.

COHN v. CHAPMAN.

[PHILLIPS'S EQUITY, 92.]

EQUITY WILL ENFORCE PAROL AGREEMENT between two that one will purchase land for the other, and take the title to himself and hold it for such other until the latter can pay for it, and when paid for will convey it to him.

PURCHASER OF LAND AT SALE MADE UNDER DECREE IN EQUITY, who has paid nothing under his purchase, and has notice of an equitable title in the complainant, cannot set up his title against complainant's equity, but is entitled by motion in the cause under an order in which he purchased to have his bond for the purchase-money canceled.

BILL for specific performance of a contract for the purchase of land. The bill states that in 1857 Cohn bargained and partially paid for the land in dispute; that in 1860 Chapman agreed to advance the remainder of the money due thereon, and take the title to himself, agreeing that upon repayment of the sum to him by Cohn, he would convey to him; that the party then holding the legal title had knowledge of and assented to these facts, but that through ignorance such agreement was not inserted in the deed made to Chapman; that Chapman was killed the same year, leaving his daughters, Laura and Mary, and his widow, Lovey L. Chapman; that the latter is administratrix, and guardian for the children; that in their names an *ex parte* petition was filed to sell the land in dispute; that one Carmer became purchaser at such sale, and executed his bond for the purchase price, but has paid no part thereof; that Cohn communicated with Mrs. Chapman respecting the money due upon the contract of 1860; that as she preferred a bond for the money, he had executed one with sureties; that since, Carmer notified him not to pay for the land and take a deed, as he (Carmer) claimed his title and intended to apply for a deed. Other facts appear from the opinion.

Manly and Haughton, for the complainant.

Green, for defendant Carmer.

By Court, READE, J. The agreement between the complainant and John Chapman, the intestate, and former husband of the defendant, Lovey Chapman, and the father of the infant defendants, as set forth in the bill, is fully admitted in the answers of said defendant; and the performance of the agreement on the part of the complainant is also admitted.

Nothing remains, therefore, but to determine whether it is such an agreement as will be enforced in this court.

A parol agreement between A and B, that A will purchase land for B and take the title to himself, and hold it for B until the latter can pay for it, and when paid for will convey it to him, is such an agreement as equity will enforce. And such substantially is the agreement in this case: *Lyon v. Cressman*, 2 Dev. & B. Eq. 2668; *Hargrave v. King*, 5 Ired. Eq. 430; *Cloninger v. Summit*, 2 Jones Eq. 513.

This would be true even if the agreement were denied in the answers, and rested on proof by the complainant. But the agreement is fully admitted in the answer of Mrs. Chap-

man for herself and her children, and said defendants declare their readiness to comply with it. But the defendant Carmer sets up title under his purchase, and objects to the other defendants making title to the complainant, and his objection was supposed to make the necessity for this suit. The defendant Carmer cannot set up any title against the complainant's equity, for he has paid nothing under his purchase, and he will be entitled, by proper motion in the cause under an order in which he purchased the land, to have his bond for the purchase-money canceled. And besides, he is a purchaser affected with notice of the complainant's equity: *Cloninger v. Summit*, 2 Jones Eq. 513.

The complainant is entitled to a decree against the defendant Mrs. Chapman, for title to the land. And he is entitled to cost against said defendant, but not against the defendant Carmer, nor is Carmer entitled to cost against the complainant.

Decree accordingly.

SPECIFIC PERFORMANCE OF PAROL CONTRACT TO PURCHASE LAND and reconvey when the purchase price is paid: *Wentworth v. Wentworth*, 72 Am. Dec. 97, and note 102. The principal case is cited with approval on the above point in *Harrison v. Emery*, 85 N. C. 165.

PURCHASER OF LAND AT EXECUTION SALE, with notice of prior equitable title, takes subject to such title: *Halley v. Oldham*, 41 Am. Dec. 262, and note 268

PHELAN v. HUTCHINSON.

[PHILLIPS'S EQUITY, 116.]

WHERE PARTNER UPON DISSOLUTION OF FIRM takes all notes and accounts into possession, and assumes control in regard to making collections and settling up the business, he is to be treated as a collecting agent, and should be charged with all notes and accounts which he has collected, or might with reasonable diligence have collected; but he is not to be charged with those not proved to be solvent, and which it is not shown could have been collected with reasonable diligence.

WHERE, IN SETTLING UP ACCOUNTS OF DISSOLVED PARTNERSHIP, interest is charged upon notes and accounts upon a wrong principle, the calculation will not be disturbed if no substantial injury is done.

IN TAKING PARTNERSHIP ACCOUNT UPON DISSOLUTION of the firm, the capital stock should not be taken into account until a balance is struck, and then, if there is any fund on hand, each should be allowed to withdraw his capital, or a ratable part of it.

IN TAKING PARTNERSHIP ACCOUNT OF DISSOLVED FIRM, debts due from one of the partners to the firm should not be deducted out of the assets of the firm. They should be deducted out of the portion coming to him after a balance has been struck.

WHETHER PARTNER WHO WINDS UP PARTNERSHIP AFFAIRS should be allowed reasonable commissions, as compensation for his time and trouble, *quære*.

BILL for an accounting of a partnership. It appears that Phelan and one Brawley formed a partnership. Brawley was already in business at the time, with stock on hand worth twelve hundred dollars. Phelan was the active and Brawley the dormant partner in the firm, which was afterwards dissolved, and its effects went into the hands of Brawley, who died without accounting. After an account was taken, defendant filed the following exceptions: "1. That intestate was charged with the accounts upon the books without evidence that they were due, or that the debtors were solvent, or that they had been received by intestate, or that intestate had been negligent in collecting; 2. That intestate was charged with interest upon these accounts from the time they had been charged on the books; 3. That intestate was credited with only five hundred dollars, instead of six hundred dollars, as his original share of the stock, although the bill stated that Brawley was originally the owner of the whole stock at twelve hundred dollars, and complainant had paid six hundred dollars for one half; 4. That intestate is charged with the whole of his individual accounts, whilst complainant's individual accounts are taken out of the partnership fund, instead of out of his own share."

Wilson, for the complainant.

Bragg, for the defendant.

By Court, PEARSON, C. J. The cause comes on to be heard upon exceptions filed by the defendant to the report of the clerk and master, and for further directions.

1. The first exception is allowed to this extent: As Brawley, on the dissolution of the firm, took all of the notes and accounts into his possession, and assumed the entire control in regard to making collections and settling up the business, he is to be treated as a collecting agent, and should be charged with all of the notes and accounts which he has actually collected, or which he might with reasonable diligence have collected; whereas the report charges him with all of the notes and accounts, except such as were proved to be insolvent. It ought also to have excepted all those which were not proved to be solvent, and in regard to which it was not proved that they could have been collected by the use of proper diligence.

2. The second exception is disallowed. If Brawley had kept an account so as to show the amount of interest collected by him, that would have been the proper basis of the interest account. The master has charged the defendant interest upon all of the notes and accounts, and allowed interest upon all of the disbursements and individual claims. This is not a correct principle, but under the circumstances it seems to have been the only one that the master could act on: and as there is really but little difference in the amount of interest on the two sides, we are not disposed to disturb the calculation.

3. The third exception is allowed. The master should not have brought the capital stock into the account until he had struck the balance, and then, provided there was any fund on hand, each could be allowed to withdraw his capital, or a ratable part of it. The stock of each was six hundred dollars. The one hundred dollars paid by Phelan to Brawley should not be brought into the account. It was paid to make up Phelan's stock, and he gets credit for it by putting his stock at six hundred dollars.

4. The fourth exception is allowed. The two accounts which Phelan owed the firm should not have been deducted out of the assets of the firm; for if so, he is only made to pay one half of the amount. These assets should be deducted out of the part coming to him in the same way that his individual debts to Brawley are deducted.

There must be a reference to reform the account according to this opinion. The defendant may claim a revision of the account on the first exception.

It is proper to add that we have not felt at liberty to enter into the question whether a partner who, after a dissolution, undertakes to act as collecting agent, or a surviving partner who settles up the business, should not be allowed commissions, as the point is not made by the exceptions. It may be that the case of *Boyd v. Hawkins*, 2 Dev. Eq. 329, modifies the English doctrine upon this subject, and that a partner who winds up the firm should be allowed reasonable commissions as compensation for the time and trouble devoted to what is a matter of mutual concern.

Decree accordingly.

IN TAKING ACCOUNT BETWEEN PARTNERS UPON DISSOLUTION, each becomes chargeable with all debts and claims which he owes, or is accountable for, to the partnership, and all interest upon such debts or claims, together with all profits made out of the partnership during its existence or since dissolution,

either rightfully or by misapplication: Story on Partnership, 7th ed., sec. 248, citing the principal case.

SURVIVING PARTNER CLOSING UP PARTNERSHIP AFFAIRS is not entitled to compensation for so doing: *Brown v. McFarland's Ex'rs*, 80 Am. Dec. 598, and note 601.

CHAMBERS v. DAVIS.

[PHILLIPS'S EQUITY, 152.]

CLAUSE IN WILL IS IMPERATIVE, and entitles the beneficiary to whatever sum is necessary to his support during his life, when it provides that the executor shall provide for the wants of the beneficiary as a matter of humanity rather than legal obligation, and also provides that the interest on a certain sum shall be set apart for his support, directs its application to that purpose, and disposes of any surplus remaining unexpended at his death.

BILL for an account and payment of a legacy. The opinion states the facts.

Boyden and Bailey, for the complainant.

Blackmer, for the defendants.

By Court, BATTLE, J. The only question as to which the counsel for the parties have asked our advice is, whether the language of the thirty-fourth clause of the testator's will is imperative, or only precatory. The counsel for the defendants say that if, in our opinion, it is imperative, the intention of the testator shall be carried out, without regard to any other objection that might be made to it arising out of the plaintiff's condition as a slave at the time when the will went into effect.

The first sentence of the clause would seem to indicate the purpose of the testator to leave it as a matter of humanity, rather than of legal obligation, on his executors to provide for the wants of his slaves. But when we notice that in the second sentence he sets apart the interest of a certain fund for their support, directs its application to that purpose, and disposes of any surplus which may remain unexpended at their deaths, we must conclude that the intention was to impose it as a legal duty on his executors to appropriate such interest to the use of the objects of his bounty. We hold, therefore, the clause in question to be imperative, and that the plaintiff is entitled to whatever sum may be found necessary as an annual support during life. There must be a reference to ascertain what that sum shall be.

Decree accordingly.

COLLINS v. COLLINS.

[PHILLIPS'S EQUITY, 153.]

ARTICLES OF SEPARATION BETWEEN HUSBAND AND WIFE, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced.

THE opinion states the facts.

Rogers and Batchelor, for the petitioner.

Phillips and Battle, for the defendant.

By Court, READE, J. It is to be considered for the first time whether a deed of separation between husband and wife will be enforced in this court.

The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism. It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics,—its oneness,—“they shall be no longer twain but one flesh,” “to live together after God’s holy ordinance,” “so long as they both shall live.” But little legislation is necessary to define and regulate it. We know it by intuition. It is induced by the strongest passion of the human soul,—love. It is the most endeared relation which nature makes or society forms. When lusts entice, or wealth prompts the relation, it may prove a curse when the one is satiated and the other wasted; but when love, virtuous and disinterested, ardent and mutual, prompts the relation, it is incomparable. Such is the relation as it exists with us. It is formed in perfect freedom. There are no constraints of parents, of custom, or of laws; nor any influences but such as are conducive to its happiness. It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven; their sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond and a common care; and they live, not separately, but together,—the nursery of morality and piety, and the bulwarks of society.

How different from this is marriage, quarrel, separation,—the anomalous condition of a husband without a wife, a wife

without a husband, parents without children, and children without parents. Such relations too surely follow deeds of separation. Let it be understood that marriage is only an experiment, to be formed inconsiderately, and broken capriciously; to be put on and off like a garment; that husband and wife may have separate establishments, in which to nurse their hate and cover their irregularities; that children may be trained to hate one parent or both, and to have the care of neither; and society to have constantly in view the nuisance of their infidelities;—and what greater evil can be imagined?

It is to be admitted that in some of the old governments, passions and vices have fixed this evil upon society. It was unknown to the common law. Roper, in his treatise on husband and wife, vol. 2, p. 267, says: "This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated, that, as in the other innovations upon that law, so in this instance, the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities. According to the original policy of England, the ecclesiastical courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties by voluntary compact to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of the doctrine in courts of law and equity, that a separation *in pais* is in effect valid, and that while it continues, the wife is to be considered in most respects as a *feme sole*."

Since this evil has attached to English society, learned judges have strongly condemned it; but too much property now depends upon it to disturb it. There has been no decision, and so far as we know there has not been even a *dictum*, in its favor in this state. In *Elliot v. Elliot*, 1 Dev. & B. Eq. 57, which was a bill to set up a conveyance by a husband to his wife, without the intervention of a trustee, Ruffin, C. J., says: "In England it has certainly been held that a gift by the husband to the wife, without the intervention of a trustee, may be made under such circumstances as to render it valid in equity and induce that court to constitute the husband himself the trustee. No case of that sort has occurred in this state; and perhaps the court might not feel the obligation to encourage the obtaining of such donations, or the creation of separate interests in the

wife, subject to her immediate and absolute control during the marriage, by an act between the husband and wife themselves which is inoperative at law."

And in *McKinnon v. McDonald*, 4 Jones Eq. 1 [72 Am. Dec. 574], where a wife claimed her separate earnings against the husband's creditors, Pearson, C. J., said: "The case presents this question: Does the doctrine of 'pin-money,' by which, in the English equity jurisprudence, a husband is allowed to give his wife the privilege of working for herself, acting as a free trader, and of acquiring profits by her earnings and savings which neither he nor his creditors can reach, obtain in this state? After much consideration, we are satisfied that it does not; because it is inconsistent with our legislation in regard to the rights and duties of husband and wife; it is at variance with the habits and usages of our people, and tends to produce an artificial and complicated state of things; so that while at law the wife's existence is considered as merged in that of her husband, her earnings are his, she cannot contract or sue and be sued; in equity she is entitled to her earnings, may act as a free trader, acquire property, sue and be sued in respect thereto.

"We thus regret another of these refined doctrines of equity jurisprudence which render the English system so extremely artificial and complicated, and add pin-money to the list of 'part performance,' 'the lien of a vendor for the purchase-money,' 'the duty of the purchaser to see to the application of the purchase-money,' and the wife's equity for a settlement."

Those cases are only in point to show that in kindred subjects our courts have desired to avoid every appearance of countenancing the separate relations of husband and wife, and to hold "that in respect to fortune, as in other things affecting their happiness, they intend by marriage to embark in the same bottom, and to sink or swim together."

If there were any doubt as to our policy, it would seem to be clearly settled by our legislation. Important as the relation is, our whole legislation is comprised in a few pages of the Revised Code. It provides that marriage shall be indissoluble, except for impotency at the time of marriage, or subsequent infidelity. It allows separation only where the wife's condition is intolerable, or life burdensome. And it allows separate support only where the husband is a drunkard or spendthrift, and is wasting his substance to the impoverishment of his family. And in all these cases the parties are

not allowed to be the judges; but they must make application to court. And so far from their consent availing anything, there must be satisfactory proof that there has been no collusion or concert; and if for divorce, that it is not for the mere purpose of being freed and separated from each other,—observe, separated from each other.

In contravention of this policy, and in disregard of their marriage vows, the parties in this case had “difficulties,” and separated; and to avoid the wholesome control of the court, they entered into an agreement by which the property was to be divided between them, and each relinquished to the other all the marriage privileges and responsibilities, and were to live separately. Such a course, if allowed, would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain dependent upon their caprice. It is true that the courts will not compel them to live together; but it is equally true that they will afford them no encouragement to separate, except in those cases provided by law.

Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one to compel a separation and settlement on the part of the other. An imperious husband secure from exposure in the courts would practice cruelties towards a faultless wife to compel a separation; and she, to buy her peace, would take such terms as he might offer.

We do not know the facts of this case, except that it seems that the wife was induced to take less than she is now satisfied with or than the law allows her.

We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court.

The demurrer is overruled, with costs.

Demurrer overruled.

AGREEMENTS OF SEPARATION BETWEEN HUSBAND AND WIFE before or after separation, validity of: *McKenna v. Phillips*, 37 Am. Dec. 438; *Rolette v. Rolette*, 40 Id. 782; *Sayles v. Sayles*, 53 Id. 208, and notes to these cases; *Stephenson v. Osborne*, 90 Id. 358.

THE RULING IN THE PRINCIPAL CASE IS QUESTIONED in *Sparks v. Sparks*, 94 N. C. 531, in view of the subsequent changes in the law of marriage re-
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garding the property rights of married women, brought about by the adoption of the Code, section 1831; but still an agreement united in by the parties to defraud each other, the public, or due administration of law will not be enforced.

SMITH v. BRYSON.

[PHILLIPS'S EQUITY, 267.]

SURVIVING PARTNER WHO HAS BEEN APPOINTED one of the administrators of the deceased partner cannot maintain a bill for an accounting against his co-administrator, especially when the bill charges fraud against the deceased. His only remedy is to have the letters of administration revoked.

BILL, for a settlement. The opinion contains the facts.

Moore, for the defendant.

By Court, PEARSON, C. J. The plaintiff, as surviving partner, asks for an account against Bryson, who is one of the administrators, and against himself, who is the other administrator, of the deceased partner. In other words, the plaintiff takes position upon both sides of the case, and when the account is to be taken he will represent his own interest as plaintiff, and also have a right to represent his deceased partner. It is apparent that an account cannot be ordered under such circumstances, especially as the bill makes grave charges of fraud on the part of the deceased, of whom the plaintiff is one of the representatives. The only mode of proceeding for the plaintiff is to apply to the county court to revoke the letters of administration, so that his deceased partner may have something like a fair showing. *Griffith v. Vanheythuysen*, 4 Eng. L. & Eq. 25, is in point. There a *cestui que trust* administered upon the estate of one of the trustees, and jointly with the other *cestui que trust* sued the surviving trustees, charging a misapplication of the trust funds by the deceased trustee. The vice-chancellor says: "The decree would involve an account of the estate of Vanheythuysen received by the plaintiff Griffin. Now, how could such an account be taken, as between Griffin and his co-plaintiffs in this suit? There is a direct conflict of interest between Griffin as representative of Vanheythuysen and his co-plaintiffs. The principle of the objection is, that the suit was so constituted that the account could not be taken," etc.

This case differs from *Harrington v. McLean*, Phill. Eq. 258,

in many respects. There the primary object of the bill was to have a specific performance of marriage articles in favor of the *feme* plaintiff in respect to certain slaves, and although the primary object failed by the political death of the slaves, it was allowed to be carried on for on account of the hires of such part of the slaves as had been in the possession of the defendant; and although Harrington, one of the plaintiffs, was the co-executor of Neill McLean, with the other defendant, Malcom McLean, yet it was alleged and proved that, at the time he qualified, he was ignorant of the existence of the marriage articles under which his wife derived her title.

Bill dismissed, with costs.

POWER OF SURVIVING PARTNER to sue administrator of deceased partner: *Shields v. Fuller*, 65 Am. Dec. 293, and note.

CASES
IN THE
SUPREME COURT
OF
OHIO.

COLLINS v. BUOKEYE STATE INSURANCE COMPANY.

[17 OHIO STATE, 215.]

WHERE AUTHORIZED AGENT MAKES PROMISSORY NOTE in form, "I promise to pay," etc., and signs as agent without mentioning his principal, he is liable as maker of the note, notwithstanding the fact that the payee knew he was acting as such agent at the time.

PAROL EVIDENCE IS INADMISSIBLE TO VARY effect of note by showing an intention to bind the principal only, when such note is made by an agent in form, "I promise to pay," etc., and signed by him as agent, without any mention of his principal, and with knowledge on the part of the payee that the maker is acting only as agent.

THE opinion states the facts.

C. D. Coffin, Flaman Ball, and Thomas G. Mitchell, for the plaintiff in error.

N. Headington, for the defendant in error.

By Court, WELCH, J. The first question made in the case is, whether there is sufficient proof of the insurance company's knowledge that Collins was acting as agent. That question we need not discuss, unless we think the fact of such knowledge would make a defense for Collins against an action on the notes. Would it make such defense? In other words, where an agent makes a promissory note in the form of these, is he liable as maker of the note, notwithstanding the fact that the payee knew he was acting as such agent at the time? We are of opinion that he is so liable. To hold otherwise, it seems to us, would be to make a new contract for the parties.

The name of the principal nowhere appears upon these notes; and the operative words, "I promise to pay," in the body of the notes, are utterly inappropriate to charge the principal. Without the word "agent" they are plainly, and in direct and appropriate language, the notes of E. K. Collins. With that word added they are admittedly still his notes, unless aided by parol proof. Now, is it competent to show by such proof that the parties intended by the simple word "agent" to change the whole tenor of the note? To change, as it were, the words "I [E. K. Collins] promise," into the words "The ship company promises"? If the word "agent" and the words "I promise" can be made to harmonize, they must both stand as the parties wrote them. Such is the well-known rule. And there is no trouble in so harmonizing them, if we read the word "agent" as mere personal description, or as a memorandum for the use of the principal and agent.

We have looked in vain over the numerous cases cited to find any one like the present, and in which the agent was not held liable. Most of the cases relied upon as such will be found to be those where the question was as to the liability of the principal, and not as to the discharge or non-liability of the agent. The liability of the principal resting in the fact that the contract was made under his authority, and not in the fact that it was made in his name, it is easy to see that different rules of evidence would apply.

The cases cited, in which the agent was held not liable, appear to be those where he was sought to be charged as indorser of negotiable paper, or — which is much the same thing — as drawer of bills of exchange. The difference between that class of cases and the present is also quite obvious. Where an agent has the legal title to a note or bill, his indorsement is indispensable to pass that title. The indorsement, like a deed, is a simple transfer of title. The liability of the indorser arises, mainly, outside of the indorsement. That liability may be changed without changing the indorsement itself. It is a mere implication of law, arising upon the indorsement. No question of the admissibility of parol evidence is involved in such cases. For, whether the law casts the implied liability upon the agent, who has a mere legal title, or upon the real equitable owner of the note or bill, in either case the written contract, the indorsement, stands unchanged by the proof. The same reasoning applies, in a sense, to the drawing of a bill of exchange, by an agent, upon funds of the

principal standing in the agent's name. The bill is a transfer of the funds, and the liability is an implication of law.

We think, with the court below, that the notes are the individual notes of Mr. Collins, notwithstanding the knowledge of his agency; and that it is not competent for him, by proof of that agency and knowledge, or by other parol proof, to vary the effect of the notes, by showing his intention to bind the principal only.

It is claimed, also, that the court below erred in refusing to reform the notes, or rather in failing to reform them, for the court does not appear to have been asked to do so, either in the pleadings or at bar. To this claim it is certainly a full answer to say, not only that there is no prayer in the answer for any such relief, but there is no allegation of mistake or fraud therein, nor was there any proof of such mistake or fraud on the trial. There was proof tending to show that Collins intended to bind his principal only. But there was no pretense of proof that the defendants in error so intended. There was no error, therefore, in the court's alleged refusal to reform the notes.

Judgment affirmed.

DAY, C. J., and WHITE, BRINKERHOFF, and SCOTT, JJ., concurred.

AGENT WHO FAILS TO DISCLOSE HIS PRINCIPAL binds himself personally on his contract: *Sanborn v. Neal*, 77 Am. Dec. 502; *Hall v. Crandall*, 89 Id. 64, and notes to these cases. Where one acting as agent signs his individual name to a note or bill of exchange, which from its language imports a personal liability to pay, he is bound, although in signing he describes himself as agent: *Bank v. Cook*, 38 Ohio St. 445; *Robinson v. Kanawha Valley Bank*, 44 Id. 447. And parol evidence is inadmissible to vary his liability, although it seems that an indorsement may be explained by parol: *Robinson v. Kanawha Valley Bank*, 44 Id. 448, 449, both citing the principal case.

PAROL EVIDENCE IS INADMISSIBLE TO VARY, contradict, or construe the terms of a written contract: *Rockmore v. Davenport*, 65 Am. Dec. 132; *Bromley v. Elliot*, 75 Id. 182; *Timms v. Shannon*, 81 Id. 632; *Arnold v. Jones*, 82 Id. 617, and notes to these cases.

ALFELE v. WRIGHT.

[17 OHIO STATE, 228.]

WHETHER SLANDEROUS WORDS ARE ACTIONABLE IN THEMSELVES as imputing criminality, without alleging special damages, depends upon whether the charge, if true, would subject the party charged to indictment for a crime involving moral turpitude, or subject him to an infamous punishment.

WORDS CHARGING FEMALE WITH WANT OF CHASTITY, or which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable *per se* in Ohio. But this rule is not extended to one of the male sex, where the words are of similar character.

WORDS WHICH CHARGE MAN WITH GROSS DISHONESTY, for which, if true, he would be liable in a civil action, but which do not import a charge of burglary, larceny, or other crime, are not actionable *per se*. The rule is here applied to words spoken by one partner against the other.

SLANDER, consisting of these words: "A friend told me that you had a share in breaking into the store the other night, and I believe so too"; "I'll be damned if I don't think it's so"; "I know it's so"; "I am sure of it"; "I'll be damned if it's not so," etc. Other facts are stated in the opinion.

Murray, for the plaintiff in error.

Thompson and Mathers, for the defendant in error.

By Court, SCOTT, J. The question is, whether the words charged to have been spoken by the defendant in this case are actionable in themselves, without alleging special damages. They are not alleged to have been spoken in reference to the trade or profession of the plaintiff, and if actionable, it must be because they impute criminality to the plaintiff. In regard to slander of this character, the general rule of the common law is, that in case the charge, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be, in themselves, actionable, and otherwise not: 1 Hilliard on Torts, 245, sec. 1; *Brooker v. Coffin*, 5 Johns. 188 [4 Am. Dec. 337]; *Watson v. Trask*, 6 Ohio, 531 [27 Am. Dec. 271], *per* Wright, J.; *Dial v. Holter*, 6 Ohio St. 228.

It is said by Starkie to be clearly established that "no charge upon the plaintiff, however foul, will be actionable, without special damage, unless it be of an offense punishable in a temporal court of criminal jurisdiction": 1 Starkie on Slander, 21.

As it is not jeopardy of punishment, but injury to reputa-

tion, which constitutes the ground of the action of slander, it is probable, though we have no common-law crimes in Ohio, that words importing a charge of great moral turpitude, and which at common law would subject the guilty party to infamous punishment, though not embraced in our criminal code, would be held actionable *per se* in this state.

The only innovation upon this common-law rule which has been hitherto made in this state is in regard to the slander of a female. Words charging a woman with a want of chastity, or which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves: *Sexton v. Todd*, Wright, 316; *Malone v. Stewart*, 15 Ohio, 319 [45 Am. Dec. 577]. But this exception has never been extended to the other sex, where the words were of a similar character: *Wilson v. Robbins*, Wright, 40. And we feel neither disposed nor authorized to extend the innovation.

Applying this rule to the present case, the words charged are clearly not actionable in themselves. For though they charge the plaintiff with gross dishonesty, for which, if true, he would be liable to a civil action at the suit of the defendant, yet they do not import a charge of burglary, larceny, or any other crime made punishable as such, either by statute or at common law. The petition shows that the ownership and possession of the storehouse broken into, and of the goods abstracted, were in both the parties to this action, as partners. An entering of the house, under these circumstances, by one of the partners, or by other persons with his permission, would not be burglary; nor could the taking and carrying away of the goods by either partner, or by others with his consent and assistance, be a larceny.

The demurrer to the petition was properly sustained, and the judgment of the court below must be affirmed.

DAY, C. J., and WHITE, WELCH, and BRINKERHOFF, JJ., concurred.

SLANDER. — WORDS CHARGING CRIMINAL OFFENSE are actionable *per se*, but they must impute crime: *Little v. Barlow*, 71 Am. Dec. 219, and note 220. The principal case is cited to this point in *Kaucher v. Blinn*, 29 Ohio St. 63, where it is held that words charging a man with having a venereal disease are actionable *per se*; also in *Hayner v. Coroden*, 27 Id. 296, holding that words charging a minister of the Gospel with drunkenness are actionable *per se*.

WORDS SPOKEN OF FEMALE which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in

society as is her right as a woman, are actionable *per se*: *Malone v. Stewart*, 45 Am. Dec. 577; *Smith v. Silence*, 66 Id. 137, and note 143. The principal case is cited to this point in *Davis v. Brown*, 27 Ohio St. 329-331, where it is said that while this rule prevails in favor of a woman, still it has never been extended to a man, where the words are of similar character.

NO ACTION LIES FOR CALLING MAN OPPROBRIOUS NAMES, such as liar, cheat, etc.: *Van Tassel v. Capron*, 43 Am. Dec. 667. The principal case is cited to the last point in the *syllabus, supra*, in *Davis v. Brown*, 27 Ohio St. 329.

FARAN v. ROBINSON.

[17 OHIO STATE, 242.]

ADMINISTRATOR WHO HAS MADE SUPPOSED FINAL SETTLEMENT, and exhausted the personal assets in the payment of debts due from the estate and the statutory allowance to the widow, and who, as administrator, afterwards unsuccessfully defends a suit brought against him for a debt due from his intestate, is entitled to an order to sell so much of the real estate of the decedent as may be necessary to pay the judgment and costs thus recovered against him, notwithstanding the fact that the intestate's real estate has been partitioned among the heirs, and by them conveyed to third parties.

IN COLLATERAL PROCEEDING, JUDGMENT OBTAINED AGAINST ADMINISTRATOR is conclusive evidence of the indebtedness adjudged by it, unless impeached for fraud or mistake, or perhaps for culpable negligence of the administrator in the defense of the action in which it was obtained. It cannot be impeached for error.

ESTATE OF INTESTATE IS PRIMARILY LIABLE TO PAY JUDGMENT obtained against the administrator, and if his sureties are compelled to pay it in the first instance, they are entitled to be subrogated to the rights of the judgment creditor, and to enforce the judgment against the estate.

REAL ESTATE OF DECEASED PERSON is liable for the payment of his debts, subject to the widow's dower, and his heirs to whom it descends take *cum onere*; whoever buys from them does so subject to the application of the rule of *caveat emptor*.

THE opinion contains the facts.

Collins and Herron, for the plaintiffs.

French and Cunningham, and G. B. Hollister, for the defendants.

By Court, BRINKERHOFF, J. If from the mass of minute details contained in the agreed statement of facts on which this case is submitted we eliminate the few prominent facts which establish the relations of the parties, the questions which arise out of those relations are found to be both few and simple.

The plaintiff, Faran, as administrator of Ewing, adminis-

tered the estate of his intestate. In the payment of the debts due from the estate, and of the statutory allowance to the widow of the intestate, not only all the personal assets, but a considerable sum derived from rents of real estate accruing after the death of the intestate, were exhausted. All debts due from the estate, so far as known and recognized by the administrator, being thus paid, a settlement of the estate, then supposed to be final, was made; and a small balance remaining in his hands—though much less than the sum derived by him from the rents of real estate before mentioned—was distributed among the heirs of the intestate. The heirs thereupon made partition of the real estate among themselves; and subsequently they individually made a variety of sales and conveyances of and out of their respective shares to other parties.

Pausing here, and bearing in mind the facts thus far outlined, we will go back again.

Ewing, the plaintiff's intestate, was at the time of his death administrator of the estate of one Clark, having been duly appointed, and having given bond with sureties as such, and died without having made settlement of his accounts as administrator, and leaving an apparent balance of considerable amount in his hands in favor of the estate he represented unaccounted for. And between two and three three years after the filing by the plaintiff, Faran, of his supposed final account, an administrator *de bonis non* of Clark's estate presented to him for allowance a claim for the before-mentioned balance apparently remaining in the hands of Ewing in favor of that estate at the time of his death. The plaintiff rejected this claim; and thereupon the administrator *de bonis non* of Clark brought suit on the bond of Ewing, as administrator of Clark, against the plaintiff as administrator of Ewing, and Cary and Spader, sureties of Ewing in his bond. The plaintiff, Faran, so far as appears, without collusion, in good faith, and with due diligence, attempted to defend the suit; but in this he failed, and judgment was rendered against him as administrator, together with the sureties in the bond, in December, 1859, for \$885 and costs; this judgment remains in full force unsatisfied and unreversed; and it is to pay this judgment and costs that he now asks an order to sell so much of the real estate of which his intestate died seised as may be necessary for that purpose.

Is he entitled to such order? We think he is. He is en-

titled to it under the distinct provisions of section 130 of the act "for the settlement of the estates of deceased persons": 1 Curwen's Statutes, 734. Whether error did or did not intervene in the rendition of that judgment is not a question of which in this proceeding we can take cognizance. In this collateral proceeding, it is conclusive evidence of the indebtedness adjudged by it, unless impeached for fraud or mistake in obtaining it; or perhaps the culpable negligence of the plaintiff in the defense of the action in which it was obtained: *O'Connor v. State*, 18 Ohio, 225. And no fraud or mistake, recognized in law as such, is here claimed to have existed in the obtaining of the judgment against the plaintiff in this case, nor is there any allegation of such negligence.

It is said in argument that the judgment may be enforced against and its amount collected from the plaintiff's co-defendants in the judgment,—the sureties in the bond of the plaintiff's intestate. So, perhaps, it might. But this would be inequitable. The estate of the plaintiff's intestate is primarily liable for it, and ought to pay it; and if the sureties were compelled to pay it in the first instance, the ultimate result would be the same; for they would be subrogated to the rights of the judgment creditor, and entitled to enforce the judgment against the estate represented by the plaintiff here for their indemnity.

The fact that the real estate of the plaintiff's intestate has been partitioned among his heirs, and by them conveyed with or without notice to third persons now claiming title in or through them, makes no difference. Under our laws, the real estate of a deceased person, subject to the widow's right of dower, is, in the last resort, as much and as truly assets in the hands of his personal representatives for the payment of debts as his personal property is. His debts are a lien on his real estate; his heirs to whom it descends take it *cum onere*; and whoever buys it from them does so subject to the application of the rule of *caveat emptor*: *Stiver v. Stiver*, 8 Ohio, 221. For their indemnity, if any, in case their lands are sold out from under them, they must look to such guaranties or warranties as they may have had the precaution to insist on, or to such right as they may have to compensation or redistribution from their co-partitioners.

Decree for plaintiff.

DAY, C. J., and WHITE, WELCH, and SCOTT, JJ., concurred.

ADMINISTRATOR MAY RECOVER DEBT OF HIS INTESTATE which he has paid, and of which he was not aware when he distributed the estate: *Turner v. Egerton*, 19 Am. Dec. 235.

JUDGMENT IN COURSE OF RIGHTFUL ADMINISTRATION concerning matters over which the court has jurisdiction cannot be collaterally impeached: *Withers v. Patterson*, 86 Am. Dec. 643.

LAND OF INTESTATE IS LIABLE FOR PAYMENT OF HIS DEBTS: *Douglass v. Massie*, 47 Am. Dec. 375; *Fisk v. Norvel*, 58 Id. 128; *Walbridge v. Day*, 83 Id. 227.

RULE OF CAVEAT EMPTOR APPLIES TO ADMINISTRATORS' SALES: *Thompson v. Munger*, 65 Am. Dec. 176, and note 179.

MONROE v. BARCLAY.

[17 OHIO STATE, 302.]

FRAUD OR UNDUE INFLUENCE TO INVALIDATE WILL must have some effect upon the testator in producing the very act of making his will.

UNDUE INFLUENCE TO AVOID WILL is a question of fact for the jury.

WILL CANNOT BE INVALIDATED FOR UNDUE INFLUENCE in the absence of fraud, no matter by what influence a testator may be moved, so long as he is put under no restraint which overpowers his inclinations and judgment, and induces a disposition of his property contrary to his own wishes and desires.

WILL CANNOT BE INVALIDATED BECAUSE PRODUCED by influences springing from a lawful or unlawful marital relation, unless such influence has been unduly exerted; and to have the effect of avoiding the will, the influence must place some restraint upon and prevent the free exercise of the testator's judgment and motives in making the will.

UNDUE INFLUENCE GROWING OUT OF UNLAWFUL MARITAL RELATIONS to avoid a will should be left with the other evidence for the jury to determine.

THE opinion states the facts.

G. M. Tuttle and J. M. Stull, for the plaintiffs in error.

F. E. Hutchins, for the defendants in error.

By Court, DAY, C. J. The original case was a proceeding in the court of common pleas to contest the validity of the last will of Mary McClelland, deceased, upon three grounds: 1. That at the time of executing the will she was not of sound mind and memory; 2. That she was fraudulently induced to make the will; 3. That the will was procured by undue influence of the defendants upon the testatrix.

The issues joined by the parties upon these grounds were tried to a jury, and a verdict was rendered in favor of the defendants, sustaining the will.

The testimony is not fully set forth in the bill of exceptions; it is therefore to be presumed that the finding of the jury was, under the charge of the court, warranted by the evidence.

The only errors insisted on here arise upon exceptions taken by the plaintiffs to the refusal of the court to charge the jury as requested by them, and to the charge as given.

The plaintiffs submitted to the court twenty-one propositions in writing, which they requested the court to give in its charge to the jury.

It is stated in the record that "the court refused to charge as requested, except as stated" in the charge given to the jury; and that the plaintiffs excepted to the "refusal to charge as requested, and to the charge, so far as the same is contrary to said request."

The charge and the propositions submitted by the plaintiffs are fully set forth in the bill of exceptions, but no reference is made in the charge to any one of the propositions; so that it is not specified in the record which one of the propositions the court refused to give as requested. This is left to be discovered, by seeing what part of the plaintiffs' requests were not embraced in the charge given. It will be seen, moreover, that the plaintiffs excepted to the charge so far only as the court omitted to adopt the written propositions submitted by them, and so far as the charge was contrary thereto.

It is not deemed necessary, for the purpose of presenting the questions made by the exceptions, to recite here said propositions or the charge in full. Suffice it to say that most of the propositions were substantially given in the charge to the jury, as requested. This does not seem to be strenuously controverted by the counsel for the plaintiffs, except as to the propositions numbered from 16 to 20, inclusive. Indeed, the whole controversy arising out of the neglect of the court to charge as requested, and upon the charge as given, may be fairly presented by stating these five propositions, and the charge relating to them. The propositions are as follows:—

"16. If, previous to the will being made, John McClelland, or any person acting in concert with him, took advantage of imperfect though not absolutely unsound judgment, on the part of the testatrix, and by advice known by them to be false, induced her to believe that she owed to Erastus Jacobs no duty as a wife, and she made the will under the continued influence of that persuasion, the will is void.

"17. That for this purpose it makes no difference whether

it relates to matters of fact merely, or whether it related to matters of judgment only, provided it related to matters about which she, in her imperfect condition of judgment, might be and actually was misled by the advice.

"18. If, at the time of making the will in question, Mary Jacobs, the testatrix, from false advice knowingly given by John McClelland, or by any other person acting with him, believed that Erastus Jacobs was not her lawful husband, when in fact he was, and that John McClelland was her lawful husband, when in fact he was not, the will is void.

"19. It makes no difference whether the false advice thus given was in relation to some matter of fact or in relation to some matter of law, concerning her relation to Jacobs and McClelland, provided she, being then possessed of impaired powers of judgment, believed the advice to be true, and acted accordingly.

"20. If a man knowingly and wrongfully marries and cohabits in a state of adultery with a woman who is the lawful wife of another man, and whose husband has not forfeited his claims to her comfort and society, and by the influence of such marriage and cohabitation procures a will from her in his favor, and disinheriting her real husband, that will is void for illegal influence."

It is to be observed that these propositions make no allowance for any other facts or circumstances which might modify the assumed facts, but assert that the facts assumed would, under any circumstances, invalidate the will.

Under the sixteenth proposition, it is assumed that it would make no difference when, or for what purpose, the testatrix was induced to believe that she owed to Erastus Jacobs no duty,—no matter if it was for a purpose having no reference to a disposition of her property; still, it is assumed that if the advice was ever given for any purpose, and the false belief continued, the will is void, although the advice had no effect whatever in producing the will.

Under the seventeenth proposition, it is claimed that the will would be void if the testatrix was misled by the false advice, without assuming that she was thereby induced to make the will, or that such advice had the least influence on the testamentary act. Indeed, these two propositions, taken together, assume that if the testatrix was, at any time and for any purpose, misled by the false advice of McClelland as to her duty to Jacobs, and remained under such false impression

when the will was made, though it had no relation thereto and in no way tended to produce it, still the will was void.

The same may be said substantially as to the eighteenth and nineteenth propositions. In the nineteenth, which is the most explicit, it is not assumed that in acting upon the false advice, she did so in relation to the will.

It is undoubtedly well settled that to invalidate a will for fraud or undue influence, it must appear that the fraud or undue influence had some effect "upon the testator, in producing the very act of making his will": Redfield on Wills, 516, 524, 525, 527.

But however this may be, the most that can be claimed of these four propositions is, that they are based on that kind of undue influence which amounted to fraud upon the testatrix. This is the gist of them; and upon a fair construction of the charge so far as they tended to induce the will, they were substantially given to the jury. It is difficult, therefore, to see wherein the plaintiffs were not permitted to have all the benefit of these propositions, to which they were entitled.

Upon this point the court charged the jury "to inquire whether any fraud or misrepresentations were resorted to to induce the execution of this will. If such fraud was exercised, then it would, however slight, destroy the validity of the will; that is, if it was sufficient to and has, in your judgment, tended to induce the execution."

Here the court, in reply to these four requests, told the jury that if "any fraud or misrepresentations were resorted to to induce the execution of the will, . . . however slight, . . . if it tended to induce the execution" thereof, the will was void.

If these requests are construed as relating to the act of the testatrix in making the will, then the plaintiffs had the full benefit of them in the charge. In that case, the record does not show affirmatively that they were refused by the court, or that they are embraced in the exceptions taken by the plaintiffs.

But the point that seems to be chiefly relied on by the plaintiffs is made on the twentieth proposition. Upon the facts there assumed, it was claimed, as a presumption of law, that the will was produced by illegal, and therefore undue, influence. The court did not accede to this proposition, but left the question of undue influence to be determined by the

jury, under the following instructions relating to this and other propositions:—

“Inquire whether, through the exercise of force, or by fear produced, or in any manner, such an influence was exerted over her as to induce her to make a disposition of her property, contrary to her own will and inclinations; or whether such an undue and overruling influence was exercised upon her mind as to control or overpower her own inclinations and judgment, or induce her, without or contrary to her own intention and will, to execute the paper;—if either of these propositions are found in the affirmative, it would defeat the will.”

Construing the charge strongest against the plaintiffs, it would seem that the court intended to be understood as holding the law to be, that in the absence of fraud, no matter by what influence a testator may be exercised, so long as it does not overpower his inclinations and judgment, and induce a disposition of his property contrary to his own wishes and desires, his will cannot be invalidated for undue influence. Indeed, it is not denied but that the charge as applied to ordinary cases may be sustained by both reason and authority; but it is claimed that a distinction is to be taken between influences that are lawful and those that are unlawful.

The gist of the claim is, that the will was void because it was induced by influences growing out of an unlawful relation.

No matter for what reason the testatrix may have been abandoned by her husband, or why she may desire to disinherit him and her kindred, or what obligations may have arisen from the unlawful relation; no matter if the will was made without any influence of the devisee, other than that which sprung from their association; and no matter if it was made in accordance with her own inclinations and judgment,—still, it is assumed that the will would be void.

If no other objection than this was urged against a gift of property between living parties, it would hardly be contended that it would be void. It is difficult to see why a bequest or devise should be subjected to a more stringent rule.

Every will, it may fairly be presumed, is prompted by influences strong enough to induce its provisions; and it would seem, therefore, that the most that ought to be claimed from such influences in the contest of a will is, to have them submitted to the jury, to enable them to determine whether the testator was misled, or so influenced thereby as to affect his

own free choice and judgment in the disposition of his property.

The power to make a will is granted by the statute to "any person of full age and sound memory"; and under its provisions the will is to be admitted to record as valid when "duly attested and executed, and the testator, at the time of executing the same, was of full age and sound mind and memory, and not under any restraint": S. & C. Stat. 1615, secs. 1, 15.

Restrictions are imposed upon none, but all are alike left to the exercise of their own free-wills and inclinations in the disposition of their property. The power thus given to dispose of property does not depend upon the disposition made thereof, nor is it restricted to those who may employ it only for just and wise purposes; but all upon whom the right is conferred may use it without "any restraint." Indeed, it is contemplated by the statute that this is the only way in which it can be exercised. Freedom from restraint is essential to the validity of a will. So careful is the law in this respect, that it will not uphold a will that has been induced by restraint upon the testator, whether in the form of fraud practiced upon him, or any other influence that destroys the free exercise of his own will: Redfield on Wills, 524, 527.

It would be inconsistent with the right conferred by the statute, and with the spirit of the construction it has hitherto received, to sanction restraints upon a testator based alone on the character of the motives or causes that may have induced any disposition of his property that he may make while in the free exercise of his own inclinations and judgment. He may give his property to whomsoever he pleases, and his motives or reasons therefor, so long as he is "not under any restraint," are matters of his own conscience, for which he is not accountable to the law. His will, executed in conformity to the statute, if it be his own, and not in any sense the will of another, cannot be invalidated, however much its provisions may be disapproved by others.

It is claimed in the proposition under consideration that the will, upon the facts therein assumed, would be void for "illegal influence." In the solution of the question made by this proposition, much of the difficulty disappears when we consider what "influence," as applied to the invalidation of wills, is "illegal."

Every will, as before remarked, is the result of influences

strong enough to produce it. Since, then, it is the policy of the law to secure to every one the right to dispose of his property in accordance with his individual will, that influence alone is illegal which places the freedom of a testator's will under some kind of restraint. If this be so, it follows that it matters not what may be the origin or character of any influence operating upon a testator, if it does not place him "under any restraint." It would seem to follow, also, that it would be equally immaterial how an individual may have acquired an influence over a testator, unless such influence is exerted in a manner that tends to restrain the free exercise of his will in the disposition of his property.

It is claimed in this proposition that the influence that produced the will was illegal only because it sprung from an unlawful relation. If this be so, then the principle would be equally applicable to any other unlawful relation, and would destroy a will made under influences springing therefrom, although the testator, without being placed under restraint, could not be persuaded to make a will otherwise than as prompted by such influences. However reprehensible such influences may be, if a testator voluntarily chooses to be actuated by them, it is a privilege he may enjoy under the law that secures to every one alike the right to dispose of his property without restraint upon his own judgment and conscience.

It is undoubtedly well settled that a will cannot be invalidated because it was produced by influences springing from a lawful marital relation, unless such influence has been unduly exerted. The influence arising from an unlawful marital relation may be as strong as that of the other; but unless it impairs, more than the other, the free exercise of the testator's will, it is difficult to see how the influence arising from the unlawful relation is necessarily such undue influence as will invalidate a will, while that of the other will not. It would seem, upon the principles already stated, that the question would be essentially the same in either case,—whether the influence had been, in fact, exerted in restraint of the testator's will.

However justly an adulterous marital relation may be reprobated, it by no means follows that every will, produced by influences arising from that relation, is tainted with such turpitude that, to uphold it, would "do violence to the morality of the law." This is the theory upon which the claim of the

plaintiffs rests. But the moral test will not in all cases avail. If the principle be correct, it makes no difference which party makes the will: whether the devise be from the woman to the man, or the man to the woman; it would be equally void.

It would be easy to suppose cases where considerations of moral obligation, as well as that of public duty, would require a man to make suitable provision for a woman with whom he had sustained this relation. In such cases it would do no violence to the morality of the law to sustain such provision, though it be made by will, and induced solely by influences springing from the unlawful cohabitation.

It may, however, be admitted that the influences growing out of an unlawful marital relation do not stand, and should not be permitted to stand, upon an equal footing with those coming from the lawful relation; but the question recurs, whether the difference is in matter of law or of fact. If it be the former, then every will induced by an unlawful relation is void, though the testator might not have been "under any restraint"; but this, it has been shown, is contrary to the general policy of the law. If it be the latter, then the proof of the unlawful relation should go, with the other evidence, to the jury, to enable them to determine the question of undue influence.

We think this would be in accordance with the law, and, in general, best subserve the ends of justice. We have not been furnished with authorities, nor do we see any sufficient reason, to warrant us in making this class of cases an exception to the general principles relating to the validity of wills.

It is true that the position of the counsel for the plaintiffs is strongly supported *obiter* in the able opinion delivered in the case of *Dean v. Negley*, 41 Pa. St. 312 [80 Am. Dec. 620]. The point there ruled, however, went to the extent only that proof of the making a will under, and in the direction of, an unlawful relation like that in this case was such evidence of undue influence "that it may justify a verdict against the validity of the will"; and it was held, therefore, that it was error to exclude it from the jury. That the same court must hold the question to be one "of fact, merely," and not "a presumption of law," is shown in a still more recent case, where it was declared that "undue influence, to avoid a will, must be such as to overcome the free agency of the testator, at the time the instrument was made": *Eckert v. Flowry*, 43 Pa. St. 46; *Redfield on Wills*, 534.

The propositions which the counsel for the plaintiffs requested the court to give in its charge to the jury, although separately numbered, were in fact, many of them, a connected series of propositions, dependent one upon another, some of which, we have shown, the court could not properly give; other independent propositions were properly refused, as has been shown; and the remaining ones were embraced in the charge. There was, therefore, no error in refusing to charge as requested.

For the reasons already stated, we think that there was no error in the charge as given to the jury by the court of common pleas. It follows that the district court rightfully affirmed the judgment of that court; and that the judgment of the district court must, therefore, be affirmed.

WHITE, WELCH, BRINKERHOFF, and SCOTT, JJ., concurred.

UNDUE INFLUENCE TO VITIATE WILL must be such as destroys the free agency of the testator: *Floyd v. Floyd*, 49 Am. Dec. 626; *Woodward v. James*, 51 Id. 649; *Taylor v. Wilburn*, 64 Id. 186; *Taylor v. Kelly*, 68 Id. 150, and notes to these cases; *St. Leger's Appeal*, 91 Id. 735.

UNDUE INFLUENCE ARISING FROM LAWFUL OR UNLAWFUL RELATIONS as vitiating will: *Dean v. Negley*, 80 Am. Dec. 620. The principal case is cited in *Kessinger v. Kessinger*, 37 Ind. 344, where it is said that an influence exercised by a wife may be lawful and legitimate, while that used by an adulteress may be undue and illegitimate; hence to charge that the influence arising from the two relations is the same in effect is erroneous.

QUESTION OF UNDUE INFLUENCE arising from an unlawful relation to vitiate will should be left to the jury: *Dean v. Negley*, 80 Am. Dec. 620, and note 624.

WASHINGTON INSURANCE COMPANY v. HAYES.

[17 OHIO STATE, 432.]

WHERE POLICY OF INSURANCE CONTAINS CONDITION that it shall become void if the property "shall be sold or conveyed," and it is taken upon mortgaged property, after which it is assigned to, and the property delivered to, the mortgagee, with the assent of the company, such transfer of the possession and control of the property is not, of itself, such sale and conveyance as will invalidate the policy.

WHERE POLICY OF INSURANCE CONTAINS CONDITION "that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein, this policy shall be null and void," and the stock of goods insured is removed to and merged in another stock, which is insured under policies covering accruing stock, the insurance on the latter will cover the former; and if effected without the consent of the first insurer, the policy issued by him is void.

ACTION on a policy of insurance. Defendant in error is the mortgagee of the stocks of goods mentioned in the opinion; he is also the assignee of the policies of insurance mentioned therein. The other facts are stated in the opinion.

M. R. Keith, for the plaintiff in error.

Prentiss and Baldwin, for the defendant in error.

By Court, DAY, C. J. The principal questions presented for our consideration in this case arise upon exceptions taken to the refusal of the court to charge the jury as requested by the plaintiff in error.

One proposition that the court refused to give in its instructions to the jury was as follows: "That if, from the evidence, the jury find that Edwin Phinney, while the owner of the Ghent stock, mortgaged it to any person, and, subsequent to the date of the policy made by the Washington Insurance Company on the Ghent stock, transferred the possession and control of the same to the mortgagees, it was such an alienation of the stock as rendered the policy issued by said company thereon void, under the stipulations therein contained."

This proposition is consistent with the facts in the case, that the policy was made subsequent to the mortgage, and that the goods were delivered, pursuant to the mortgage, after the date of the policy. The delivery of the possession of the stock to the mortgagee, upon a mortgage made before the insurance was effected, would not literally come within the stipulation contained in the policy, that if the property "shall be sold and conveyed" the policy shall be void. It is to be presumed that the company knew that the property had then been conditionally sold, when the policy containing a provision against future alienation was made.

The question made by the proposition was, whether the policy was invalidated by the surrender of the possession of the goods after the insurance was procured, upon a conveyance thereof executed previous to the insurance. As applicable to this case, in the light of the facts exhibited by the bill of exceptions, it is apparent that this was the real question made.

It appears that the policy was made subsequent to the mortgage; that the policy was assigned to the mortgagee with the assent of the company; and that after the goods were delivered to the mortgagee, the company gave written permission for their removal from Ghent to Sharon, where they were burned. In a case like this, we think the court might well

hold that the transfer of the possession and control of the stock to the mortgagee was not, or itself, such a sale and conveyance of the property as would invalidate the policy. There was, therefore, no error in refusing to charge the jury as requested in the foregoing proposition.

The plaintiff in error further asked the court to charge the jury: "That if, from the evidence, the jury find that the stock of goods in the Sharon store was insured by policies of insurance binding and valid at the time the Ghent stock was removed to the Sharon store, and expiring at a future date, and that the Ghent stock was merged with the Sharon stock, and both sold from promiscuously, said insurance would cover the Ghent stock after it was so merged; and if the defendant had no notice, it would render its policy on the Ghent stock void."

It is conceded that each of the policies procured by Phinney covered all such changes as the stock underwent in the natural course of business by ordinary purchases and sales. It is claimed, however, that the bringing together two old stocks would not come within the rule. This precise point is decided adversely to the defendant in error, in the case of *Walton v. Louisiana Ins. Co.*, 2 Rob. (La.) 563.

The evidence showed that when the Ghent stock of goods was removed to the Sharon store, they were put upon the shelves and mixed with the Sharon stock, and from that time the goods were sold promiscuously and treated as one stock. It is difficult to see why the goods removed from Ghent and mixed with the Sharon stock were not accruing stock at the Sharon store the same as other goods brought there for sale from New York or any other place. If they were such accruing stock, they were undoubtedly embraced in the Humboldt and Manhattan policies insuring the Sharon stock.

It does not appear that the Washington Insurance Company was notified that the Sharon stock was insured in another company, nor that it in any manner consented that the Ghent stock should be covered by an insurance in another company.

The policy on which the action was brought contained a provision "that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein, . . . this policy shall be null and void."

It would seem to be clear, therefore, that if the stock of goods insured by the plaintiff in error were removed to and merged in the other stock while it was insured in other companies, the insurance on the latter stock would cover the goods

in the other; and that if such insurance was effected without the assent of the plaintiff in error, its policy, by the terms thereof, was void.

But this is, substantially, what the plaintiff in error asked the court to charge the jury. We think, therefore, that the court erred in refusing this request of the plaintiff in error.

It is unnecessary to notice the remaining propositions that the court refused to give to the jury as requested by the plaintiff in error, for the reason that they are made to depend so much on the two we have considered, it does not seem to be essential.

As to the error alleged in overruling the demurrer to the petition, it only need be said here that we think the demurrer was properly overruled; but as the questions involved arose chiefly upon the construction to be given to the facts stated in the petition, or were such as were cured by the pleading of the plaintiff in error, a more extended report is not deemed necessary.

Judgment reversed and cause remanded.

WHITE, WELCH, BRINKERHOFF, and SCOTT, JJ., concurred.

CONDITION IN POLICY OF INSURANCE AGAINST SALE, transfer, or alienation, effect of: Note to *Lane v. Maine Mut. F. Ins. Co.*, 28 Am. Dec. 154, citing the principal case at page 155; *Power v. Ocean Ins. Co.*, 36 Id. 665; note to *Morrison's Adm'r v. Tennessee etc. Ins. Co.*, 59 Id. 304, citing the principal case at page 307; *Stout v. City Fire Ins. Co.*, 79 Id. 539; *Ayers v. Hartford F. Ins. Co.*, 85 Id. 553, and note 563. The principal case is cited in *Hammel v. Queen's Ins. Co.*, 54 Wis. 82, to the point that the giving of a mortgage is not a sale, transfer, alienation, change, or conveyance of the insured property.

CONDITION IN POLICY AGAINST OTHER INSURANCE, EFFECT OF: Note to *Clark v. N. E. Mut. F. Ins. Co.*, 53 Am. Dec. 53.

COURT MAY LOOK TO PURPOSES OF STATUTE, state of the case in which the undertaking was given, the object for which it was authorized, and surrounding circumstances, to ascertain the legal effect of the parties' undertaking: *Alber v. Froehlich*, 39 Ohio St. 249, citing the principal case.

STEIN v. STEAMBOAT PRAIRIE ROSE.

[17 OHIO STATE, 471.]

JUDGMENT UPON ENTIRE AND INDIVISIBLE CONTRACT is a bar to a subsequent recovery upon the same cause of action. So where a boat was hired at a certain rate per day until delivered back in good order, without specifying any time when redelivery should take place, it was held that the boat should have been redelivered within a reasonable time, when the hire therefor would have been due, that the contract was entire, and that a judgment for the hire due at the end of such reasonable time was a bar to an action for hire thereafter accruing.

WHERE JUDGMENT OF CINCINNATI SUPERIOR COURT at special term is reversed at general term, the court may proceed to render final judgment instead of remanding the case to special term for further proceedings, when the record shows that the same judgment was rendered that should have been rendered at special term, and that in no event could any other judgment be properly rendered, whether at special or general term.

THE opinion contains the facts.

Gholson and Henderson, for the plaintiff in error.

Lincoln, Smith, and Warnock, for the defendant in error.

By Court, DAY, C. J. The original suit in this case was brought February 15, 1864, in the superior court of Cincinnati, under the provisions of the water-craft law of this state, against the steamboat *Prairie Rose*, to recover for the hire of the barge *Mary Jane*, from January 2 to July 22, 1863, at ten dollars a day, amounting to \$2,020.

The defendant answered, denying the allegations in the petition; and, among other defenses, set up that the barge was hired by the owners of the steamboat in August, 1862, to accompany the boat from Cincinnati to Evansville, Indiana; that the barge was left there in September of the same year; that the boat was subsequently sold to the present owners, who had no notice of any claim against the boat for the hire of the barge; and that on the first day of January, 1863, the plaintiff brought a suit in said superior court against the defendant, for the hire of the barge from the time it was originally received by the defendant to the commencement of the suit, embracing all the time the barge was used by the defendant, and recovered a judgment therefor, which has been paid.

The plaintiff replied, denying that the barge was hired to accompany the boat from Cincinnati to Evansville, and alleges that the barge was hired August 13, 1862, at ten dollars a day, until it was delivered back in Cincinnati in like good order as received.

The plaintiff, in his reply, further says "that he admits that he has received all but a small balance for the hire of said barge, from the thirteenth day of August, 1862, until the first day of January, 1863, but claims by and under said agreement there is still due to him the sum stated in his said petition, and for the amount at the rate of ten dollars per day. as therein specified."

It appears from the bill of exceptions that the plaintiff sought to recover in this case on the following contract:—

"CINCINNATI, August 13, 1862.

"I have this day hired barge Mary Jane, of Albert Stein, for the sum of ten dollars per day, until delivered back in Cincinnati, in like good order as received.

"GEO. W. COX, Capt.,

"For Steamer Prairie Rose and owners "

It also appears that the action brought January 1, 1863, upon which there was a recovery as stated in the answer, was founded solely upon the same contract; and the present case was brought for the barge hire that accrued under the contract from the date of the former suit to the time when the plaintiff repossessed himself of the barge.

The plaintiff recovered a judgment for \$2,412.45. The case was taken by proceedings in error, on the part of the defendant, to the superior court at general term, where the judgment was reversed, and a final judgment was rendered in favor of the defendant.

The case is brought into this court by petition in error, to reverse the judgment of the superior court at general term, for the reasons that the court erred in reversing the judgment rendered at special term, and in rendering final judgment in favor of the defendant, instead of remanding the case to the special term for further proceedings.

The first question presented for consideration is, whether there was error in the judgment rendered at special term. The view we entertain of the case renders it unnecessary for us to consider but one of the grounds urged in argument for the reversal of that judgment.

It is shown by the record that the original action in this case and the action between the same parties previously brought were both founded on the same contract. It is well settled that if this is an entire, and not a divisible, contract, the plaintiff exhausted his remedies by the first suit, and cannot sustain another action thereon: *Hites v. Irvine*, 13 Ohio St. 283; *Bendernagle v. Cocks*, 19 Wend. 207 [32 Am. Dec. 448]; *Fish v. Folley*, 6 Hill, 54; *Secor v. Sturgis*, 16 N. Y. 554; *Logan v. Coffrey*, 30 Pa. St. 196.

Here the principal question in the case arises, whether the contract was entire or divisible. The consideration furnished by the plaintiff to the defendant was entire; it consisted of the delivery of the barge, to be used until returned. There being no suggestion of divisibility in the consideration for the contract, is there any in the promise made thereupon by the

defendant? The undertaking of the defendant is not fully expressed in the instrument executed on its behalf. It is, therefore, to be construed so as to effect the true meaning of the parties; and this is to be gathered from the writing, in the light of the circumstances under which it was made. We think that the parties understood the writing as obligating the defendant to return the barge to Cincinnati, and to return it in as good order as it was in when received; and when so returned, to pay for the use thereof at the rate of ten dollars per day. It surely could not have been contemplated by them that there should be remitted to the plaintiff, at Cincinnati, ten dollars daily from the boat wherever it might be; nor that the plaintiff should follow the boat and make such daily collections. Such a literal construction of the contract would lead, not only to the necessity of such daily payment, but to the more absurd perpetual per-diem liability, in case it became impossible to return the boat. The parties must have contemplated the redelivery of the boat, and that the sum due for the hire should then be paid. But no time is mentioned in the contract when the barge should be returned. Doubtless this was omitted for the reason that it could not be told how long it would take to make the contemplated trip, or complete the service for which the barge was hired. The law, however, will imply—just what the parties clearly intended—that the barge was to be returned at such time as would be reasonable under the circumstances attending the transaction. We think that this is the true construction to be given to the contract, and is one that would harmonize with the meaning of the parties, and secure justice to each of them. It gives to the plaintiff a full remedy under it, whether it be for the hire of the barge, or for injuries it might receive, or for the value of the barge on failure of its return.

Upon the construction we have given to this contract, we do not see how anything more can be claimed for it than that it should stand upon the same principles that it would if a definite time had been expressed in it for the return of the barge. The authorities in like cases most clearly rebut the claim that the insertion of the per-diem rate was intended to divide the contract, and warrant a suit at the end of each day.

In *Larkin v. Buck*, 11 Ohio St. 561, it was held that a promise to work six months, certain, at eleven dollars per month, is an entire contract, and the sum is payable only at

the end of the time, and upon performance of the full amount of labor.

The sole object of the reference in such cases to separate days or months is to provide a convenient mode of ascertaining the amount of the compensation to be paid under the contract, and is not for the purpose of dividing it. To this effect is the case of *Hutchinson v. Wetmore*, 2 Cal. 310 [56 Am. Dec. 337], where an agreement to labor eight months at one hundred dollars per month was held to be an entire contract, although at the end of four months the plaintiff was by the contract entitled to a note for the amount of service then rendered, payable at the end of eight months.

It is claimed in this case that payment was to have been made at the end of each day. A similar argument in *Davis v. Maxwell*, 12 Met. 290, was replied to as follows: "The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But however reasonable such a contract might be, it is not, we think, the contract which is proved. There is no time fixed for the payment, and the law, therefore, fixes the time, and that is, in a case like this, the period when the service is performed."

In *White v. Brown*, 2 Jones, 403, a contract "to pay for three slaves ten dollars per month until we finish our contract's on the railroad," was held to be an entire contract. Speaking of the construction to be given to the contract, it is said in that case, that "as it stands, the more obvious meaning of the expression is, that the whole amount which the defendants were to become liable to pay was to be ascertained by calculating for the whole time at that rate per month. As the term of service was left indefinite, this was essential to enable the parties to determine how much one was to receive and the other to pay."

And in *Cunningham v. Jones*, 20 N. Y. 486, a contract to build a house by "day's work," without agreement as to the sum to be paid or time of performance, was held to be an entire contract.

In *Shaffer v. Lee*, 8 Barb. 412, a bond conditioned to furnish the obligee a support during life was held to be an entire contract, and that a failure to provide for him in accordance with the substance and spirit of the contract amounted to a total breach.

In *Fish v. Folley*, 6 Hill, 54, where, on a contract to fur-

nish water from a mill-dam to carry a mill for an indefinite period, a recovery had been had for a breach of the contract in totally failing to supply the water,—as in this case there was a total failure to return the barge,—it was held, that to allow a recovery in a subsequent action for the continued failure to supply water, “would be splitting up an entire cause of action in violation of established principles.”

If the theory advanced by the plaintiff is correct, he was not bound to bring a single suit as he did in this case, but might have brought over two hundred separate suits, each for ten dollars, and before as many magistrates as he might choose to select. No such result could ever have been contemplated by the parties. The more reasonable construction is that which we have given to the contract.

The barge was to be returned in a reasonable time. The plaintiff, if the contract were entire, was entitled to receive his barge and money at the same time. If the barge were not returned upon demand in a reasonable time, it would be a breach of the contract for its return. The right of the party in such case is not to exact the ten dollars a day perpetually, but to charge at that rate for a reasonable time, and to collect the value of the barge; and by suing in January, 1863, he in effect averred that the reasonable time had expired, and the whole debt became due.

Holding as we do that the contract on which the action is based is an entire and not a divisible contract, it follows that the action was barred by the former recovery thereon, and that the judgment at special term was properly reversed by the court at general term.

It remains to be considered whether, after having reversed the judgment, the court erred in proceeding to render final judgment in favor of the defendant, instead of remanding the case to the special term for further proceedings.

By the seventeenth section of the “act to establish the superior court of Cincinnati,” the court at general term is empowered to reverse, vacate, or modify a judgment rendered at special term, and “to render such judgment as should have been rendered at special term, or remand the cause to the special term for judgment; and upon such judgment execution may issue, as upon original judgments”: S. & C. Stat. 390.

Under this section there was no want of power to render final judgment in a proper case for the exercise of that power. Unless the record shows that such judgment was in some

measure prejudicial to the rights of the party against whom it was rendered, a reviewing court could not find that the power was unwarrantably exercised. This the record does not show; so far from it, on the other hand, it shows that the same judgment was rendered that should have been entered at special term, and that in no event could any other judgment be properly rendered, whether at special or general term. It clearly appears from the record that both suits were brought upon the same contract; indeed, this is shown by the pleadings alone in the present case. The answer sets up a recovery for the use of the barge during all the time it was used by the defendant. This is not denied by the plaintiff; but he alleges in his reply that the barge was hired at ten dollars a day from August 13, 1862, until returned, in as good order as received; and he admits that he has received nearly all his pay for the hire of the barge until January 1, 1863, but claims that "by and under said agreement there is still due to him the sum stated in his said petition"; for which judgment is prayed. Thus by the pleadings it is shown that this suit was based on a contract upon which there had been a former recovery. This is placed beyond dispute by the bill of exceptions. We have shown that the former judgment was a bar to a recovery in this. Nothing, therefore, could have been gained by the plaintiff if the cause had been remanded to the special term; for upon the pleadings as they stood that court must have rendered judgment against him; and from the facts disclosed in the bill of exceptions, it appears that no amendment could be made that would in any event entitle the plaintiff to recover on the cause of action on which the suit was founded. There was then no error by the court at general term in proceeding to render such final judgment in the case as should have been rendered at special term. It follows that the judgment of the superior court at general term must be affirmed.

WHITE, WELCH, BRINKERHOFF, and SCOTT, JJ., concurred.

JUDGMENT IS BAR WHEN IT AFFECTS SAME PARTIES, involves same matter, and determines same cause of action: *Coffin v. Knott*, 52 Am. Dec. 537; *Gray v. Gillilan*, 60 Id. 761; *Agnew v. McElroy*, 48 Id. 772; *Barnes v. Gibbs*, 86 Id. 210; *Day v. Vallette*, 87 Id. 353.

LONG v. MULFORD.

[17 OHIO STATE, 484.]

GUARDIAN AD LITEM MUST PROTECT RIGHTS OF HIS WARD, and it is his special duty to ascertain and bring these rights directly under the consideration of the court for decision, for the court will not suffer the ward to be prejudiced either by the admissions or laches of the guardian.

DECREE AGAINST INFANT MAY BE SET ASIDE where fraud or surprise is practiced in obtaining it.

JURISDICTION OF EQUITY TO PROTECT INFANTS is not confined to strictly fiduciary relations. It may give relief in all cases where influence is acquired and abused, and confidence reposed and betrayed.

ABSOLUTE DECREE CANNOT BE RENDERED AGAINST INFANT without notification and a day allowed him in court, after coming of age, within which to show cause against it.

DECREE AGAINST INFANT MAY BE IMPEACHED for error by original bill, and what would have been good cause of action to sustain the bill will be good cause of action under the code.

WHERE DECREE AGAINST INFANT and deeds thereunder have been obtained through fraud, and the infant is not guilty of laches, the statute of limitations will not begin to run against him until the discovery of the fraud; and the burden of showing such knowledge as will set the statute in operation rests on the other party.

EQUITY WILL NOT PERMIT GUARDIAN, or other person standing in a fiduciary relation, or who, from the relation in which he stands to another, is capable of exercising an undue influence over his mind, to derive profit from any transaction which takes place during the continuance of such relation.

THE opinion contains the facts.

McFarland and Millikin, and Matthews, for the plaintiffs.

Thurman, and Smith and Christy, for the defendants.

By Court, WHITE, J. The papers in the chancery suit referred to in the petition were introduced in evidence. The bill was filed by Jacob as complainant against David, Job, Mary the widow, and the present plaintiffs, Sarah Jane and Mary Ann, then infants, the former in the twelfth and the latter in the ninth year of her age.

The bill sets forth a description of the lands described in the petition in the present case, and states that in consideration that Jacob and Job had labored for their father several years after they respectively arrived at age, he agreed to divide between them the three parcels of land described, consisting of 216 acres, and to convey to each his proportion, "independent of the interest each would be entitled to as heirs, after his [the father's] death, in the home farm." The home farm is likewise described, and is said to contain about 250 acres. It is

averred that Job and Jacob were put in possession of their respective parcels by their father in his lifetime, and that they had continued in possession ever since.

The bill further represents that a similar agreement for a similar consideration had been made by the father with David, the other brother, in relation to the tract of seventy-five acres; and that the father had died without making the conveyances he had agreed to make, either to the complainant, Jacob, or to the defendants David or Job, and that they were left without a legal title to their respective farms.

It is stated that the widow is entitled to dower in the lands known as the home farm; and that these lands descended to the complainant, his two brothers, and his two infant sisters, as heirs at law, each owning an undivided one fifth.

The bill prayed that the defendants might be decreed to convey to the complainant title to his tract of land; that the widow's dower in the home farm might be assigned, and the farm partitioned among the heirs.

On the 19th of September, 1844, the separate answers of David, Job, and the widow were filed. These answers admit the making of the agreement as set forth in the bill; and David and Job pray its execution on their respective behalf, and for partition of the home farm; and the widow, disclaiming dower in the residue of the lands, asks to have her dower in the home farm assigned.

The journal of the court shows no appointment of a guardian *ad litem* for the infant defendants; but on the 1st of October, 1844, the day of the filing of the decree, a formal answer of a guardian *ad litem*, purporting to be made in their behalf, was filed. This answer, the answers of the adult defendants, as well as the bill and decree, are in the handwriting of the complainant's solicitor.

The decree filed in the case finds in accordance with the allegations in the bill, and grants the relief prayed for in the bill and answers.

It adjudges and decrees that Jacob, David, and Job shall each hold in fee-simple the premises agreed to be conveyed to them, respectively (describing the premises), "free from any right or claim of the said Mary Mulford (widow), Mary Ann Mulford, and Sarah Mulford, in or to the said tracts, or any part thereof"; and provides "that the said Mary, Mary Ann, and Sarah be forever barred and precluded from claiming the same, or any portion thereof, or any interest therein." Dower

is ordered to be assigned in the home farm, and partition to be made, subject to the dower, among the five heirs in equal proportions.

No conveyances are required to be made by the minors on their coming of age; nor is there a day given them after that time within which to show cause against the decree, which, by its terms, takes immediate effect, and is in its nature absolute.

The only evidence on which the decree was taken was the deposition of Samuel Kyle, the father-in-law of the complainant, Jacob, taken at the office of the solicitor of the latter, on the 18th of September, 1844, the day on which all the answers of the adult defendants were written. The deposition was taken under a notice served only on the defendants, who admitted the allegations in the bill, and the service of which they had formally acknowledged several days before. No notice was served on any one representing the infants. David and Job, whose interests coincided with the plaintiff, but which were adverse to the interests of the infant defendants, were duly notified, as was the mother, who was voluntarily relinquishing her dower. There was no cross-examination. The whole of the testimony is as follows: "That prior to the decease of John Mulford, he [witness] had conversation with him in relation to the disposition of his real estate. Said Mulford told him he intended to give the seventy-five-acre tract adjoining Middletown to his son David; and the Bruce and Freeman tracts to Job and Jacob,—Job getting the east part and Jacob the west part of the same. The said John Mulford stated that Job and Jacob had been and were helping him to pay for the last-mentioned tracts by working with him after they were twenty-one years of age; and that this was his reason for making such disposition of the same."

There is nothing inconsistent in this testimony with the several tracts of land mentioned being regarded by the father as advancements to the sons. No contract is spoken of as having been made between him and them for the lands. The father declared "he intended to give" each of the sons a designated tract. Job and Jacob had been and were helping him to pay for two of the tracts by working with him after they became of age; and "this," he said, "was his reason" for making the proposed disposition of his property. No promise could be implied against the father to pay them

either in lands or otherwise for their continuing to live and work with him after they became of age. The consideration, or "reason," stated as moving him to make the contemplated disposition was not applied to David; yet the terms used to express the father's intention that David was to have the seventy-five acres are as explicit as those used to show that Jacob and Job were to get the other two tracts.

Nothing is said tending to sustain the allegation in the bill that they were in addition to get their full share as heirs in the home farm; and the testimony indicated no more than an intention on the part of the father, in the voluntary disposition of his property, to advance the sons in the way stated.

The deposition does not state how long it was before John Mulford's death the conversation referred to took place. He died in 1840, and at that time Job was in the twenty-third and Jacob in the twenty-fifth year of his age, and David, who is not mentioned as having assisted his father by his labor, was in his twenty-eighth year.

In the partition of the home farm, there were set off to David 55.36 acres; to Jacob 55.58 acres; to Job 55.31 acres; to Sarah Jane 42.36 acres; and to Mary Ann 42.74 acres. The lots set off to Sarah and Mary were contiguous tracts, and together made 85.10 acres; out of which was assigned the whole of the widow's dower, consisting of 77.42 acres; thus leaving to the minors only 7.68 acres not covered by the life estate of the widow, and to each one a parcel of less than four acres, of which the use and enjoyment could be had during the life of the widow.

The commissioners to make the partition were not selected from the neighborhood, but from the town of Hamilton, eight miles distant from the lands.

At the February term, 1845, the assignment of dower, and the partition, as made by the commissioners, were confirmed, and one sixth of the "costs and expenses of the cause" was adjudged against each of the parties.

The journal entries are very meager,—the following being all that the journal contains relating to the cause:—

Jacob Mulford	}	September Term, 1843.
v.		In Chancery. Bill filed. Returned
Mary Mulford et al.	}	served.

Parties appear and cause continued.

Jacob Mulford } **May Term, 1844.**
v. } **In Chancery. Bill filed. On decree for**
Mary Mulford et al. } **sale.**

Parties appear and cause continued.

Jacob Mulford } September Term, 1844.
v. } In Chancery. Bill for partition and an-
Mary Mulford et al. } swers filed.

Parties appear, and cause coming on for hearing, it is ordered, adjudged, and decreed as per interlocutory decree on file, and cause continued.

Jacob Mulford } February Term, 1845.
v. } In Chancery. Bill filed on decree for
Mary Mulford et al. } partition.

Parties appear, and cause coming on for hearing, it is ordered, adjudged, and decreed as per final decree on file.

No subpoena or other process is found among the papers in the original case. Nor does the final record of the case contain, as the statute required, a copy of such process or of the return of the sheriff showing the manner of service. The following, which comes immediately after the copy of the bill, is all the record contains in respect to process, viz.: "Therefore the sheriff of the county of Butler aforesaid is commanded that he give notice to the said Mary Mulford, David Mulford, Job Mulford, Sarah Mulford, and Mary Ann Mulford to be before the judges of our said court of common pleas immediately, at Hamilton, to answer the said bill, etc. And afterwards, to wit: The —— day of ——, in the term of September aforesaid, before the judges aforesaid, here at Hamilton, comes the said Jacob Mulford, by his solicitor aforesaid, and the sheriff of the county aforesaid, to wit, William J. Elliott, Esq., now returns that by virtue of the writ aforesaid to him directed, he hath given notice to the said Mary Mulford, David Mulford, Job Mulford, Sarah Mulford, and Mary Ann Mulford, to be, etc., on, etc., to answer, etc., as by said writ he was commanded."

In the cost bill there is no charge in favor of the sheriff for mileage or service of process, though there is a charge in favor of the clerk for issuing.

A great deal of testimony has been taken in the case which cannot be noticed in detail, but from which it satisfactorily appears that John Mulford, the father, before his death contemplated making a family arrangement for the disposition of

his real estate, by which he intended to give to his three sons the several farms which they afterwards respectively obtained, and to reserve for himself, his wife, and his infant daughters the home farm; that he gave David possession of his farm in 1838, and Jacob and Job possession of theirs respectively in 1839; that he aided them to improve and cultivate their farms, by furnishing timber, teams, and in other ways, while he lived, but died before he had consummated his contemplated arrangement, and without having made conveyances; that the lands given to the sons were in fact advancements, and that there was no agreement that they were, in case of his death, to share equally with the other heirs in the "home farm."

On the death of the father, the family living on the homestead consisted of the mother, Jacob, Job, Sarah Jane, aged eight years, and Mary Ann, aged five years,—David at that time living on his own land. No guardian was appointed for the girls. On the subject being talked about in the family, Job thought the appointment of a guardian unnecessary; and according to his testimony, "David and Jacob managed the concerns of the girls first"; afterward he assisted,—rented their lands, accounted for the rents, and did other service, for which no charge was made. Mrs. Mulford states that Jacob and Job together acted as agents for the girls. From 1853 to 1857, she and the girls lived in Job's family; and afterward, to the time of their marriage, the girls resided with their mother at the homestead. From the death of their father to their marriage, the property of the girls was managed principally by the brothers, among them, and on whom the former relied for advice and protection in regard to their rights and interests.

David's education seems to have been superior to that of the other sons, and after he came of age he spent considerable time from home in traveling. He went to Europe in 1836 with the aid of means furnished by his father; spent some time in the South, teaching school; and in the spring succeeding his return home in the fall of 1837, he was given possession of his lands. Job, in his testimony, says: "David was at home except when traveling; can't say what he did; he superintended some; suppose he more than paid his board."

The deeds which were obtained from the girls as they respectively came of age were all prepared by David for execution without any previous authority from the girls, and were executed by them on the representations of their brothers that

the making of the deeds were according to the order of the court, and in ignorance of their rights and of the fact that any injustice had been done them in the division of their father's estate. No consideration was paid or expected to be paid for the deeds. No negotiations were had, and no bargain or agreement was made or contemplated, in respect to the making of the deeds. The girls supposed they were merely performing a duty by perfecting in legal form undoubted pre-existing rights. And this they might well suppose from the influence it is reasonable to infer their brothers had over them, arising from the relation of dependency, trust, and confidence which had existed from the father's death, and which still continued to exist between them as brothers and sisters.

The justice, before whom the first deeds were executed and acknowledged, testified that he "went to Jacob Mulford's at request of David in 1851, to take acknowledgment of deeds; they were prepared; I did not read them; they said they related to the lands. Deeds not explained. I asked David if I should read them; he said not, that the parties understood them. David professed to be a kind of attorney and surveyor. Usually read the deeds to the parties; in this case I did not."

The justice before whom the other deeds were acknowledged had died, and the testimony of the other witnesses was conflicting as to whether the deeds were read and explained to the girls at the time of their execution.

The girls were married — one in September, 1860, and the other in October, 1861, and it was not till after their marriage that they became definitely informed of their rights, and that the lands given to their brothers should have been taken into account in making partition of the home farm.

It appears in the testimony that when the home farm was being divided "there was much talk in the neighborhood" about it; but the girls were then too young to know anything about their rights, and it does not appear that they were advised in the matter, after arriving at years of discretion, until after their marriage.

Mrs. Mulford, the widow, in her deposition taken in 1864, states: "It has not been more than two or three years since the girls expressed their dissatisfaction and made a fuss. . . . I assigned a note of one thousand dollars to them because they were dissatisfied. This was two or three years ago, after they were married."

This note was given to her by David when the estate was

settled for her share of the chattel property of the estate. He renewed it once before it was given to the girls, but has paid nothing on it.

In regard to the partition of the home farm and the institution of the suit for that purpose, Job in his testimony, in speaking of himself and his brothers, states: "We talked together and considered that the fences were running down, etc., and if we had any interest it had better be attended to."

By the present action it is sought to impeach the decree rendered by the court of common pleas at its September term, 1844, and to set aside the deeds obtained from Sarah Jane and Mary Ann on their respectively arriving at age. Our conclusions of fact fully appear in the foregoing statement of the case. The original suit was a bill in equity having a double object: 1. The specific performance of the agreement alleged in the bill to have been made between the sons and the father in his lifetime for the several tracts of land they respectively claimed; and 2. The partition of the residue of the real estate among the five heirs in equal proportions. The extent of the interests of the heirs in the land to be divided was dependent upon the establishing of the alleged contract and the granting of the specific performance. If this relief was granted to the sons, the partition of the residue would be in equal shares; if refused they would be charged with their respective tracts in making partition, and their shares in the residue would be correspondingly diminished.

Though in the form the suit was made to take Jacob was the only plaintiff, and David and Job were defendants, yet their interests coincided; the suit was brought by a previous arrangement between them, and the claims of all were alike adverse to their infant sisters.

It is doubtful whether process was ever served on the infants, but if service had been made it would have made no difference in the decree, considering the tender years of the girls—one under nine, and the other under twelve years of age—and their dependence on their brothers for the management of their affairs. The whole management of the suit would have been left, as it in fact was, to the brothers. No guardian was appointed, and when the appointment of one was talked about it was concluded none would be necessary. Strangers could not be expected to interpose, and while the brothers maintained their family influence over their younger sisters, and assumed to act for them and to manage their

property, they were bound to act with scrupulous fidelity, and can derive no advantage arising either from intentional misconduct or gross negligence.

The appointment of a guardian *ad litem* is not a mere matter of form. A suit against an infant cannot be prosecuted without such guardian; and the object of the requirement is to secure to the infant a proper defense. "It is the duty of a guardian *ad litem* to ascertain from the infant and his friends, or from other sources of information, what are the legal and equitable rights of his ward. And it is the special duty of the guardian to bring those rights directly under the consideration of the court for decision": *Dow v. Jewell*, 21 N. H. 486; *Sconce v. Whitney*, 12 Ill. 150; *Knickerbacker v. De Freest*, 2 Paige, 304; 1 Daniell's Chancery Practice, tit. Infants. His authority is to protect; and the court will not suffer his ward to be prejudiced either by his admissions or his laches: Bingham on Infancy, 135. And "where the answer of the guardian admits the bill to be true, the complainant must prove its allegations with the same strictness as if the answer had interposed a direct and positive denial": *Enos v. Capps*, 12 Ill. 257; *Massie v. Donaldson*, 8 Ohio, 377; *Warfield v. Owens*, 4 Gill, 370.

It is plain there was no defense by a guardian *ad litem*. The only evidence of the appointment of a guardian is a formal answer, the body of which, like all the other pleadings in the cause, is in the handwriting of the counsel of the brothers; and this answer was only filed at the time of the filing of the decree. It was evidently treated as a mere formal matter. No attention was paid to the interests of the infants; and the suit throughout was conducted as though it were an amicable or *ex parte* proceeding, involving no subject of real controversy. The counsel of the brothers alone appeared in and had the management of the case; and his acts or omissions are chargeable as theirs.

The effect of the decree on the rights of the infants was to exclude the 291.57 acres advanced to the sons from being taken into account in the partition, and thus deprive them of an interest in the home farm equivalent to two fifths of the land so advanced.

The decree was taken on a single deposition, which, on examination, is shown not to have warranted it. The deposition was taken *ex parte* as to the infants, but under a formal notice to the defendants at whose instance, equally with the plaintiff, the suit was commenced. The form given to the

suit, and the manner of conducting it, was calculated rather to avoid than to invite examination and scrutiny from the court. On this point, the language of the lord chancellor, in *Richmond v. Tayleur*, 1 P. Wms. 737, is pertinent. The suit was a bill in equity to impeach a decree against an infant, on the ground of fraud and collusion. The chancellor said: "If any fraud or surprise upon the court had been proved, I would have set aside the decree; but, on the contrary, it appears that the court was fairly and fully apprised of the case, of the articles, and of the point in question; viz., the lapse of time, and hath thought fit to make a decree, which, as it may be a just one, therefore I will not set it aside."

And I am unable to see why a party who chooses to retain the influence and control arising from a fiduciary or a *quasi* fiduciary relation to an infant, against whom he is prosecuting a suit to obtain a conveyance, should be held to a less degree of good faith in dealing with the court, in respect to the subject-matter, than he would be required to observe in dealing directly with the party.

Where parties dealing directly stand towards each other in such a relation, the obligation not only to abstain from false suggestions, but to make full disclosures, is imperative. And this principle applies to members of the same family dealing in that character as to their rights: *Adams's Equity*, 179, note 1, 183; *Hill on Trustees*, 148.

"Imperfect information, given in a way calculated to produce a false impression, is equivalent to concealment. 'He,' says Lord Eldon, 'who, undertaking to give information, gives but half information, in the doctrine of this court, conceals'": *Id.*

If the party intends to take the position and stand on the rights of a stranger, or of an adversary, he ought first to surrender the advantages arising from the trust, confidence, and control which pertain to his fiduciary or *quasi* fiduciary character.

The jurisdiction which courts of equity employ "to protect infants is not confined to cases of a strictly fiduciary character. The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed. In the former, influence is presumed; in the latter, its existence must be proved": *Smith v. Kay*, 7 H. L. Cas. 751.

In delivering his opinion in the case last named,—which

was a bill in equity by a plaintiff to set aside a bond and securities given on his coming of age, confirmatory of debts contracted during minority, — Lord Cranworth said: "In my opinion, although this bill is framed upon the ground of supposed fraud, the circumstances of the case, as now proved, make it abundantly clear that this fraud was totally immaterial in order to entitle the plaintiff to set aside this bond, upon the ordinary principle of the court, which protects an infant, or any other person who is, from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. There is, I take it, no branch of the jurisdiction of the court of chancery which it is more ready to exercise than that which protects infants and persons in a state of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependent. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances. The principle is not confined to those cases, as was well stated by Lord Eldon in the case of *Gibson v. Jeyes*, 6 Ves. 266, 278, in which he says it is 'the great rule applying to trustees, attorneys, or any one else.' Now what does 'any one else' mean? It is contended that it applies only to persons who stand in what is called a fiduciary relation. I believe, if the principle is examined, it will be found most frequently applied in such cases, for the simple reason that the fiduciary relation gives a power of influence."

This principle has application in the present case, not only directly to the manner of obtaining the deeds from the plaintiffs as they became of age, but applies also to the obtaining of the decree, which was made the grounds for obtaining the deeds.

But independent of the question of fraud, there was clear error in the decree, not only in decreeing specific performance of the alleged contract, but in making the decree absolute against the infants, without allowing them a day in court after coming of age, within which to show cause against it.

It is said by Chancellor Kent, in *Mills v. Dennis*, 3 Johns. Ch. 368, that it was the ancient, and has been the settled principle of the court that no decree should be made against an infant, without giving him a day (which was usually six months) after he comes of age, to show cause against it; and he is to be served with process of subpoena, for that purpose, on his coming of age.

In *Sheffield v. Duchess of Bucks*, 1 West t. H. 684, which was a case in which the infant was plaintiff, Lord Hardwicke said he took it to be the course of the court not to give a day, unless a conveyance was directed, in form or substance. The correctness of this remark of Lord Hardwicke has been doubted: See *Harris v. Youman*, 1 Hoff. Ch. 178, where the authorities are considered. But the present case comes within the rule as stated by Lord Hardwicke. The decree had the effect, as against the infants, of a conveyance, by excluding them from their inheritance.

The authorities are abundant to show that the plaintiffs were entitled to their day to show cause against the decree, and to be duly notified before it could be made absolute against them: *Dow v. Jewell*, 21 N. H. 490; *Harris v. Youman*, *supra*; *Wilkinson v. Oliver*, 4 Hen. & M. 450; *Scholefield v. Heafield*, 7 Sim. 670; *Price v. Carver*, 3 Mylne & C. 157; *Eyre v. Countess of Shaftsbury*, 1 P. Wms. 120; *Napier v. Lady Effingham*, 1 Id. 402; 2 Kent's Com. 245; Macpherson on Infants, 212; Bingham on Infancy, 131; Seaton on Decrees, 275.

Nor does the right to a day to show cause depend upon the right of parol demurrer, that is, the right of having the pleadings stayed till the infant comes of age. The right of the parol demurring was abolished by statute in this state, and has been also in England. The chancellor, in *Price v. Carver*, 3 Mylne & C. 162, clearly points out the difference between the parol demurring and the giving a day to show cause. That was a case of strict foreclosure, and it was held that the infant defendants had the right to a day to show cause against the decree on coming of age. The right, of course, does not exist in proceedings under special statutory provisions, nor in cases where sales are ordered to be made.

There is no doubt this decree would have been set aside on bill of review, if brought within the proper time. It is claimed on behalf of the defendants that this was the plaintiffs' only remedy. We think otherwise. That remedy would have been open to them if they had been adults; or if the decree had been perfected against them, by giving them a day in court to show cause against it, after they came of age; or if they had been strangers, under no disability or influence.

The obtaining from them the deeds was not calculated to awaken inquiry as to their rights, but rather to allay it. And to deny them the right to inquire into the justice of the decree, when they have never had an opportunity to contest it

or the claim on which it is founded, on the ground that the time allowed for filing a bill of review had passed before they discovered the wrong, would be unconscionable, whatever may have been the actual intention of the parties in obtaining the decree.

Under the former practice, they would have had the right on discovery of the wrong to impeach the decree by original bill; and what would have been a good cause of action to sustain an original bill is a good cause of action under the code.

In *Richmond v. Tayleur*, 1 P. Wms. 737, it was held that where an infant conceives himself aggrieved by a decree, he is not bound to proceed by way of rehearing or by bill of review, but may impeach the decree by original bill, in which it will be enough to say the decree was obtained by fraud and collusion, or that no day was given to show cause against it. And it is said in the note to the case, that Mr. Cottingham (the chancellor's secretary) acquainted the court that Mr. Vernon, in case of an erroneous decree against an infant, used always to advise the bringing of an original bill to set it aside.

It is stated by Daniell in his *Chancery Pleading and Practice* that an infant may "impeach a decree on the ground of error by original bill." And that "among the errors that have been allowed for the purpose of impeaching a decree against an infant is the circumstance that, in a suit for the administration of assets against an infant heir, a sale of the real estate has been decreed before a sufficient account has been taken of the personal estate." Also: "Another ground of error for which a decree against an infant may be impeached is, that it does not give the infant a day after his coming of age to show cause against it, in cases where he is entitled to such indulgence": 1 Daniell's Ch. Pl. & Pr., Perkins's ed. 1865, 153; *Bennett v. Hamill*, 2 Schoales & L. 566. The same doctrine is recognized in Adams's Equity, 420; Mitford's Pleading, 95; Story's Eq. Pl., sec. 427.

The rule in equity within which to file a bill of review was twenty years. In this state the time was limited to five years. Whether to an original bill to impeach a decree against an infant for errors such as have been indicated the limitation prescribed for bills of review should be applied by analogy, it is not necessary to consider. For if such should be the case, the rule would be qualified in its application by the equitable

principle that the time of limitation would not commence until discovery. The neglect of the plaintiff to secure the infant the right to show cause against the decree ought not to be allowed to work to his advantage nor to the detriment of the defendant.

Lapse of time is pleaded as a bar. The limitation or lapse of time to be applied against the right of the plaintiffs to impeach the decree is that existing before the code which excepts from its operation existing causes of action. In the absence of statutory provision, there is no principle of equity to bar the plaintiffs' right. It is true, over eighteen years elapsed from the taking of the decree to the commencement of this suit; but the plaintiffs were very young at the time of taking the decree; and no laches can be imputed to them until discovery, the delay in which is accounted for, in the present case, by the situation of the plaintiffs and their relation to the defendants.

The deeds come under the limitation of the code. But if the decree is set aside, the deeds must be also. Without a valid decree the deeds are clearly fraudulent; and, in cases of fraud, the time limited by the code does not begin to run until discovery; and the burden of showing such knowledge as will set the statute to running rests on the defendants. This is not shown.

There is another ground upon which the right of the plaintiffs to relief may, perhaps, be safely placed; and that is, by raising in the defendants an equitable or constructive trust in respect to the property in controversy.

Trusts of this description depend upon the conclusions of law independently of contract, and often arise in cases where there was no intention to create a trust on the part of any of the parties concerned; generally speaking, they are imposed *in invitum*: 1 Spence's Equity, 509. A court of equity will not permit any person standing in a fiduciary situation, or who, from the relation in which he stands to another, is capable of exercising an undue influence over his mind, to derive profit from any transaction which takes place during the continuance of such fiduciary character in the one case, or which may be supposed to have taken place by reason of such opportunities of undue influence in the other: *Id.* 626.

Mr. Hill, in his work on trustees, thus broadly states the principle upon which the court acts: "Wherever the circumstances of a transaction are such that the person who takes

the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment": Hill on Trustees, 144.

In the opinion of the court, the plaintiffs are entitled to a decree.

DAY, C. J., and WELCH, BRINKERHOFF, and SCOTT, JJ., concurred.

GUARDIAN CAN DO NOTHING TO PREJUDICE HIS WARD: *Carpenter v. McBride*, 52 Am. Dec. 379; *Hanna v. Spotts*, 43 Id. 132.

DECREE AGAINST INFANT MAY BE AVOIDED for fraud, collusion, or error in obtaining it: *Ralston v. Lahee*, 74 Am. Dec. 291; note to *Joyce v. McAvoy*, 89 Id. 189.

JURISDICTION OF EQUITY IN PROTECTION OF INFANTS is full, paramount, and plenary: *Townsend v. Kendall*, 77 Am. Dec. 534, and note 539.

DECREE AGAINST INFANT MAY BE IMPEACHED by original bill for error: *Ralston v. Lahee*, 74 Am. Dec. 291; *Joyce v. McAvoy*, 89 Id. 172, and note 189.

RIGHT OF INFANT TO BE ALLOWED DAY IN COURT, after coming of age, to show cause why decree against him should not be made absolute: *Joyce v. McAvoy*, 89 Am. Dec. 172, and note 185.

FRAUD PREVENTS RUNNING OF STATUTE OF LIMITATIONS until discovery of the fraud: *Smith v. Fly*, 76 Am. Dec. 109, and note 114; *Adams v. Guerard*, 76 Id. 624, and note 630.

AS BETWEEN PARTIES, JUDGMENT CANNOT BE IMPEACHED for fraud in a collateral proceeding: *Knapp v. Thomas*, 39 Ohio St. 387, citing the principal case.

UNDER CODE AND IN EQUITY TIME WILL NOT RUN against infant while under age, until the discovery of fraud practiced against him; and the burden of showing knowledge amounting to laches, or sufficient to set the statute running, is upon defendant: *Berkmeyer v. Kellerman*, 32 Id. 257, citing the principal case.

CIVIL ACTION CAN BE MAINTAINED under the code to impeach a judgment or decree for fraud in all cases where original bill in equity might have been maintained before the code: *Coates v. Chillicothe etc. Bank*, 23 Ohio St. 432; *Darst v. Phillips*, 41 Id. 517; *Conway v. Duncan*, 28 Id. 106, all citing the principal case.

**LANE v. BAUGHMAN AND THE SANDUSKY, DAYTON,
AND CINCINNATI RAILROAD COMPANY.**

[17 OHIO STATE, 642.]

MORTGAGEE WHOSE MORTGAGE DEBT EXCEEDS VALUE OF PROPERTY covered by the mortgage is entitled to an injunction restraining an execution creditor of the mortgagor from levying upon the mortgaged property, when the mortgagor is insolvent.

JUDGMENT CREDITOR HAS NO RIGHT TO DISCONNECT, REMOVE, AND SELL portions of mortgaged property, when by so doing he would diminish the security of the mortgagee, admitted to be inadequate. His remedy is in equity, when he is entitled to have his claim paid out of the earnings of the mortgaged property, to charge them as a fund, and subject so much thereof as may be necessary to the payment of his judgment; or he may have the interest of the mortgagor ascertained and subjected in such mode as may be consistent with the rights of the mortgagee to the payment of his judgment.

PLAINTIFFS, mortgagees of the defendant railroad company, filed their petition for an injunction restraining the sale on execution of certain personal property of said company levied on by Baughman and others to satisfy judgments held by them against the company. The mortgages held by plaintiffs are due, and have become absolute. The company is insolvent, and its property is insufficient to pay the mortgages. The property levied on by defendants is covered by the mortgages, and is part of plaintiffs' security, and necessary for operating the road; and as a levy and sale would endanger and lessen their security, they ask an injunction to restrain defendants.

A. Cahill, for the plaintiffs in error.

C. W. Dewey and J. H. Baggott, for the defendants in error.

By Court, WHITE, J. The principle recognized in *Coe v. Knox County Bank*, 10 Ohio St. 412, and in *Coe v. Peacock*, 14 Id. 190, in the opinion of a majority of the court, is decisive of this case. The ground on which the injunction was denied in the case first named was, that it did not appear that the mortgaged property was insufficient to satisfy both the execution and the mortgage debt.

The facts in *Coe v. Peacock*, *supra*, were substantially like the facts in the present case; and it was held in that case that as between an execution creditor levying upon part of the mortgaged property of an insolvent railroad company, and a mortgagee whose mortgage debt exceeded the value of the

property covered by the mortgage, the whole equitable interest in the property was in the mortgagee, and that the creditor acquired no substantial interest by his levy. Consequently it was further held in that case that though the mortgagee had, in violation of the terms of the mortgage, recovered in respect to the property levied on, yet the creditor was entitled only to nominal damages.

The right of the execution creditor to make the levy for the purpose of obtaining a lien as to any interest of the mortgagor subject to levy is admitted: *Coe v. Peacock*, 14 Ohio St. 190; *Coe v. Columbus etc. R. R. Co.*, 10 Id. 403 [75 Am. Dec. 518].

But the operation of these railroad mortgages upon subsequently acquired property, both as against the company and its other creditors, having been settled by repeated decisions, an execution creditor has no right to disconnect, remove, and sell portions of the mortgaged property, when by so doing he would diminish the security of the mortgagee, which is admitted to be already inadequate. And that the mortgagee is entitled in equity to be protected against the assertion of such right by the execution creditor is laid down in the opinion in *Coe v. Peacock*, 14 Ohio St. 191, where in speaking of the rights of the mortgagee as against the execution creditor, Ranney, J., says: "There is no doubt that upon the facts stated in the record that all the property mortgaged was largely insufficient to pay the debts incurred by it, and that the company was insolvent, he might have successfully invoked the interposition of a court of equity to prevent further proceedings upon the executions."

And in *Coe v. Columbus etc. R. R. Co.*, 10 Ohio St. 402 [75 Am. Dec. 518], in speaking of liens by levy, it is said by Gholson, J.: "When those liens are sought to be enforced by a removal of the property, he [the mortgagee] might justly complain if his security was thereby endangered."

But the mortgages in this case contain an express reservation of "so much of the income as might be necessary to pay for the running expenses, repairs," etc. We do not question that the liability of the company, for which these judgments were rendered, ought to be regarded as included in the necessary expenses, and to be paid as such; or, perhaps, even without such express reservation, they ought to be regarded as incidental liabilities incurred by the company in operating the road, and to be deducted from the earnings before the net

income covered by the mortgages could be properly ascertained.

But in this view, the remedy of the judgment creditor would be, in equity, to charge the earnings of the company as a fund, and to subject so much thereof as might be necessary to the payment of the judgment; not to remove and sell, by execution, disconnected portions of the mortgaged property, thus stopping the operation of the road, and depriving the mortgagee of his security.

Nor do we intend to deny the right of the defendants in equity, either by answer in the nature of a cross-petition, or by original petition to have the interest of the mortgagor ascertained and subjected, in such mode as may be consistent with the rights of the prior encumbrancers, to the payment of their judgments.

We are not unaware of the hardships and difficulties frequently experienced by certain classes of creditors (especially those whose claims are so small as not to justify expensive litigation for collection) of insolvent railroad companies whose property is mortgaged for more than it is worth, but who are, notwithstanding their default on their mortgages, allowed by the mortgagees to continue in the use and operation of their roads. These inconveniences result in part from the magnitude and character of the business, and the comprehensive operation now firmly established by repeated decisions, given to this description of mortgages. The difficulties referred to could in a great measure be obviated by appropriate legislation, which we should be glad to see provided.

Judgment of the district court reversed, and that of the common pleas affirmed.

DAY, C. J., and WELCH, J., concurred.

SCOTT and BRINKERHOFF, JJ., dissented.

MORTGAGE IS PREFERRED TO LIENS of execution creditors when: *Coe v. Columbus etc. R. R. Co.*, 75 Am. Dec. 518; and if the lien is sought to be enforced by a removal of the property the mortgagee may justly complain if his security is thereby endangered: See *Id.* 540.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

McCALLUM v. GERMANTOWN WATER COMPANY.

[54 PENNSYLVANIA STATE, 40.]

PRESCRIPTIVE RIGHT TO RENDER RUNNING WATER UNFIT FOR DRINKING or domestic purposes requires the strictest proof of its existence.

NO ONE HAS RIGHT TO POLLUTE WATER FLOWING THROUGH HIS LANDS so as to render it unfit to be used by the land-owner below for domestic purposes.

UPPER RIPARIAN PROPRIETOR CLAIMING RIGHT BY PRESCRIPTION TO POLLUTE STREAM cannot do so to a greater extent than it was polluted at the commencement of the twenty-one years. The right must be measured by the enjoyment.

JUDGES WHO PRESIDE OVER COURT WHICH IS ONE OF BOTH LAW AND EQUITY ARE COMPETENT to decide any question of law, and if they deem an issue to try a fact necessary, are the tribunal to try it.

PROCEEDING in court below by bill in equity, praying for an injunction to restrain the defendant from polluting the waters in the complainant's reservoirs, by the introduction into them of impurities from the defendant's factory, located on a stream above the complainant's works. The court appointed a commission to examine and report as to the causes of the alleged nuisance, and the commissioners reported as their conclusion that such causes could be traced only to the defendant's carpet-works; whereupon the court granted a special injunction. The defendant filed his answer, the plaintiffs afterwards filed a replication, and an examiner was appointed. The testimony taken appears in the opinion. After hearing, the injunction was made perpetual, and the defendant appealed.

A. H. Smith, for the appellant.

J. B. Thayer, for the appellees.

By Court, READ, J. The Germantown Water Company was incorporated under the eighteenth and nineteenth sections of an act of assembly passed the 29th of March, 1851 (Pamph. L. 295), which substantially adopted the provisions of "An act to incorporate the Honesdale Water Company," passed the 14th of March, 1850 (Pamph. L. 497), as fully as if the third section and all the subsequent sections of the said act were thereby re-enacted, substituting the borough of Germantown and county of Philadelphia, for the borough of Honesdale and county of Wayne, wherever the same are mentioned in the said act.

The president and managers of the company were authorized to purchase and hold, in fee-simple, or for any less estate, any spring or springs, stream or streams of water, or any water power or powers, near or convenient to said borough; or any lands, tenements, or hereditaments, to which any spring or springs, stream or streams of water, or any water power or powers, may be appurtenant, and convey said water into said borough by means of pipes, trunks, aqueducts, or in such manner as they shall deem most advisable and convenient; and should they find it necessary, proper cisterns or reservoirs for the reception thereof, with all the necessary powers of using the lands of individuals, and the public streets and grounds, in constructing the necessary works for supplying the borough with water. They are also authorized to erect fire-plugs or hydrants, to be used for extinguishing fires in said borough. Any person willfully destroying or injuring in any manner any of the works belonging to the company, or willfully corrupting or otherwise rendering unwholesome the spring or springs, stream or streams of water, which shall be conveyed or brought into said borough by said company, or in any way polluting or rendering noxious or offensive the said water, shall forfeit and pay a sum not less than five nor more than one hundred dollars, at the discretion of the justice before whom suit is brought; and if such judgment is not paid, and no goods of such person can be found whereof to levy the same by execution, then such person shall be committed to the county jail for any period not less than one nor more than fifty days, at the discretion of the justice rendering such judgment; "and shall remain liable for the full amount of dam-

ages to the said company in any other action instituted by them, and shall moreover be subject to and indicted for the same."

The said company was duly organized under said charters, and letters patent being issued in due form, the said company purchased a tract of land upon both branches of Crab Creek, or Paper Mill run, and erected thereon, at great expense, an engine-house, with engines and all the necessary pumping apparatus, reservoir, stand-pipe, and other works. The said company, at great expense, erected a collecting-dam across the said creek, and built a reservoir at Mount Airy. The said plaintiffs at the same time purchased also the right to use the water of the said creek and its tributaries, for obtaining therefrom the necessary supply of water, to be furnished by means of their works to the people of Germantown; and the water is conducted from the said Crab Creek into the company's reservoirs, and thence by means of iron pipes distributed to the consumers of said water.

There are two reservoirs. The small one holds about one million gallons of water; the larger one, built around it (the smaller one), holds about eleven million gallons of water when full, and could be filled with the present pumping apparatus. It is about twenty feet deep, and there is kept in it from eight to ten feet of water. There are three dams,—the upper dam, the main dam, and the middle dam. There is a pumping-well thirty feet in diameter and thirty feet deep, and the springs have been led into the well, some by pipes, some by drains, and one very fine spring immediately at the pumping-well, runs a stream from the rock into the well.

The lower dam was built as a reservoir or storing-dam; the upper dams were built to prevent heavy deposits, etc., from going into the larger reservoir, and it is casier to remove that stuff from the upper dams than the lower ones. There is a pipe leading from the middle dam along the bottom of the main dam to the breast of the main dam, and through it with a ten-inch stop-cock on the upper side of the wall of the middle dam. On the appearance of a flood or rain, this ten-inch stop-cock is opened, to let as much of the muddy and turbid water pass through as possible. The waters of the pumping-well are separated from the waters of the main dam by double walls, built without cement or mortar, with a filtering-bed between them composed of sand, charcoal, and stones, about four feet wide; and these walls are circular, and surround the well.

The sources of supply to the dam are principally from Paper Mill run and its tributaries. Paper Mill run rises south of Allen's Lane, and above defendant's factory, and is of very little importance until increased by the streams flowing into it below the factory. The main stream itself being diverted from its regular course by a race to defendant's mill, which is between one and a half and two miles above the dam. The character or quality of the water supplied by tributaries to the main stream, three or four in number, is perfectly clear and sweet both to taste and smell, and so is the water of the main stream above the mill.

The iron piping put down at the expense of the water company to supply its consumers is twenty-one miles in length; the number of dwellings supplied is 681, which at six persons to a house gives the population supplied with water at over four thousand persons, besides thirteen factories.

The evidence indisputably establishes the fact that the water of the main stream and its tributaries is naturally sweet and clear, and fit for drinking and all domestic purposes, and that if polluted or unwholesome it is entirely owing to the defendant's factory. Mr. Kneass, a civil engineer of great ability, and the chief engineer and surveyor of the city of Philadelphia, in concluding his report to the court below, says: "I therefore arrive at the conviction that there is nothing in the geological formation of that section that can injuriously affect the character of the water; that there is not sufficient marsh or bog to give any evidence of discoloration with earth or vegetable matter; that the surface of the water-shed, as to its general use, its being covered with vegetation, with the character of material overlying the rock, is well adapted for the delivery of pure water; and that the entire trouble existing from the impurity of water pumped and distributed by the water company is attributable to the refuse matter discharged into the creek of supply from the factory at Carpenter's Lane. And in conclusion would add, that a simple arrangement of piping from factory or a subsiding or storing reservoir for this refuse would prevent all trouble."

Dr. Joseph Leidy, professor in the University of Pennsylvania, and a gentleman of great scientific acquirements, concludes his report to the court as follows: "As a result of these observations and investigations, I feel convinced that the great source of the pollution of the water of the Germantown Water Company lies in the operations of McCallum's factory, and

that all other sources of impurity are so slight as to be of no importance."

Professor R. E. Rogers, another of the commission, concurred in these reports of Messrs. Kneass and Leidy, but was prevented by a very painful accident from preparing one himself.

In the joint letter of Dr. Leidy and Mr. Kneass, of the 12th of January, 1863, to the court of common pleas, they said: "Upon comparing the results of our individual researches, we have, with unanimity, arrived at the conclusion that the sources of the impure water can be traced only to the carpet-works."

The evidence clearly establishes that there was from 1851 to 1861, a period of ten years, no such impurity found in the waters at any time that was not removed at the water-works without difficulty before it was distributed to the consumers; but that after that period it became permanently impure and offensive, both to taste and smell, and entirely unfit for drinking, until the preliminary injunction was granted by the court in 1863; and that from that time it has continued to be sweet, pure, wholesome drinking-water. It is therefore clear that the pollution of the water was caused by the defendant's factory, as proved by the scientific investigations prior to the issuing of the injunction, and it is equally clear that it must have proceeded from some different use of the defendant's mill or factory, beginning in 1861. The defense, therefore, that there was no pollution, and if there were, that it was not caused by the plaintiff's factory, fails, and there therefore remains only the last defense, that the pollution in 1861, 1862, and 1863 was sanctioned by prescription. Such a prescription, to render running water unfit for drinking and domestic purposes by a riparian proprietor below you, requires the strictest proof of its existence. The rule is a universal one, that no man has a right so to use or apply water flowing through his lands as to foul the same, or render it corrupt and unhealthy, and unfit to be used by the land-owner on the stream below him for domestic purposes. "It is a principle," says Judge Rogers, "of the common law, that the erection of anything in the upper part of a stream of water which poisons, corrupts, or renders it offensive and unwholesome is actionable, and this principle not only stands with reason, but it is supported by unquestionable authority, ancient and modern. . . . The maxim is, *Sic utere tuo ut non lædas alienum*. . . . The general rule of law is, that every man has a right to have the advantage of a flow of

water in his own land without diminution or alteration in quantity or quality. . . . The use of it must be such as not to be injurious to the other proprietors. . . . Each riparian owner has a right to a reasonable use of the stream, which of course will be judged with a regard to public convenience and the general good. It has been said that this doctrine may prove injurious to the manufacturing establishments which are rising so rapidly in this country. I do not think so; but if it does, that is no reason why private rights should be infringed, although it may be a strong reason for legislative interference, in providing a mode by which compensation may be allowed to those whose rights may be affected by an establishment in which the public may be interested": *Howell v. McCoy*, 3 Rawle, 269.

If, therefore, an upper riparian proprietor claims the right to pollute the stream by prescription, or a user of twenty-one years, by an analogy to the statute of limitations, he cannot pollute the water to any greater extent than it was polluted at the commencement of the twenty-one years. That is to say, if the pollution at that period was slight or not injurious to any extent, he cannot, at any time within that period, increase it five or ten fold, so as entirely to destroy the water for drinking and domestic purposes. The right must be measured by the enjoyment, and it gives no right to use it in a different and more extensive manner.

The real defense of the defendant, as appears by his answer and the testimony produced on his behalf, is, that he had a prescriptive right, gained by uninterrupted user, to pollute Crab Creek in the manner and to the extent complained of in the years 1861, 1862, and 1863. The preliminary injunction was granted on the 16th of February, 1863, and the security approved on the 14th of November. The answer was filed on the 16th of January, 1864, and the replication on the 29th of the same month; and on the 13th of February, on motion of the defendant's counsel, an examiner was appointed, who made his report on the 6th of October, 1865; and on the 30th of December, in the same year, the final decree was entered making the injunction perpetual, after a most careful and deliberate consideration of the whole case.

There appears originally to have been an old oil-mill, which Mr. Clemens, in the war of 1812, tore down, and built a stone factory, which is still there,—additions having been made to it. As soon as Mr. Clemens built the mill and got in the

machinery, he commenced manufacturing woolen goods. On the 24th of September, 1825, William Jones purchased the property from Mr. Clemens, and carried on the same business until he reconveyed it to Mr. Clemens, on the 22d of July, 1828. From that period until the purchase by Andrew McCallum, on the 18th of November, 1831, the same business of woolen manufacturing was carried on by Clemens or other persons occupying the factory. Mr. Jones manufactured woolen flannels, woolen yarns, and satinets, and he discharged the refuse water into Paper Mill run. He used the water and horse power to run the mill, but on account of the scarcity of the water in the run, he could not do work enough to make it pay.

After Mr. McCallum's purchase, he and his partners continued the making rugs, and introduced carpet-making, and the mill was used as a carpet-mill until 1861, and druggets, blankets, flannels, and stair-cloths were made, when they thought they could do so to advantage. After 1830 considerable additions were made to the buildings, and also additions and improvements to the machinery, from time to time until 1856. The steam-engine for driving machinery was put there in 1835, and an addition to the mill was built in the same year, which was used for the engine, boiler, and dye-house. Since 1835 improvements were introduced into the factory, which caused a great deal less impurities to go down into the stream.

In 1837 a frame building was put up for weaving purposes. In 1845, having part of their business on Cresham run and Paper Mill run, they built a large addition to the factory on Paper Mill run, for the purpose of concentrating their work, and they put the machinery at Cresham run with the machinery at Paper Mill run into the same factory. At this time there had been but two additions to their dye-house, and they went on gradually increasing their business until 1853. In 1858, 1859, and 1860 there was additional machinery put in, and alterations made to increase the power. In the fall of 1861 they commenced the blanket business, the carpet business at the time being dull, and from September, 1861, to May, 1862, they ran night and day, making blankets for the army,—starting two sets of hands for that purpose,—and they left off in May, 1862, the business then being dull, and taking advantage of this lull, they put in another boiler, thereby being enabled to carry on their work with less pres-

sure. In the fall of 1862 they commenced the manufacture of blankets again. Up to May, 1862, the mill was run to its fullest capacity. Since the fall of 1862 they were running on blankets, sometimes full and sometimes slack. Blankets are woven in the grease and scoured in the web, and in scouring they use soda-ash and soap. The blankets were made for the army under two contracts, the first beginning in September, 1861, and the second in September, 1862, when they recommenced making army blankets under a contract directly with the United States.

The analysis by Professor Booth and Mr. Huston, in 1852, shows the water to have been pure and fit for drinking, although not so good as the Schuylkill. The analysis in December, 1862, by Mr. Garrett, a partner of Professor Booth, shows a very large increase of organic matter contained in the water of the Germantown water-works, which he considered exceedingly objectionable. "I would say decidedly objectionable; I like that word better. I have the Germantown water introduced into my house, and during the summer and fall of the year in which the analysis was made, it was not fit for any household purpose. . . . If the water stood over night, it formed a dark sediment, and had an offensive odor. . . . A few weeks after the injunction was granted, the water improved, and I have been using it ever since."

Dr. Leidy, in speaking of his examinations of the stream, says: "At all times, below McCallum's factory, the sides of the creek presented a large accumulation of bluish black and reddish filth derived from the factory operations. This filth consists of hairs or wool, colored and uncolored; filaments of cotton, colored and uncolored; particles of dye-stuffs, undissolved, and amorphous granular matter. From the factory along the creek to its termination in the large pool of the Germantown water-works, the sides and bottom are covered with a copious iron-gray or dirty bluish tenacious slime, which evidently has its origin in the operations of McCallum's factory, as it contains similar ingredients to the filth just mentioned; and it forms the *nidus* of a profuse growth of nyctodermatous filaments, or mold, such as is constantly produced on decaying animal and vegetable matters. The same slimy sediment covers the rocks composing the dams of the upper and lower pools, accumulates at the bottom of the latter, and is also seen adherent to the surface of the overshoot at the outlet of the main pool.

"The colored water of the creek below McCallum's, and that of the pools, has an unpleasant, feeble taste and odor, recalling to mind the rancid greasy smell so common in factories generally. The same smell and taste was perceived in the water supplied by the Germantown Water Company to the residence of a friend living in Germantown.

"Water from the creek below McCallum's, or from the pools, together with a portion of the bluish slime, kept a few days in glass vessels, undergoes decomposition, and emits a powerfully putrescent odor, readily accounted for from the putrefactions of dye-stuffs, hair or wool, together with other animal and vegetable particles. No trace of the bluish slime was discoverable on the creek above McCallum's factory, nor in any of the tributaries of the creek below the latter."

The evidence of Mr. Potter as to the former pure state of the water prior to 1861 is very strong, and his account of the change in the fall of that year corresponds with Dr. Leidy's. "It was a continuous flow, with very little cessation. When the discharges [of the refuse matter from the mill] commenced, they continued for the best part of twenty-four hours."

The hot water was much more offensive than the cold, "having a smell more of an animal nature, and so very objectionable that few consumers used it either for washing or bathing purposes."

"In the fall and summer of 1862, we received the discharge with increased fury, Mr. McCallum having in the mean time erected additional machinery. In the spring there had been a lull." From the fall of 1862 it continued until the injunction, which is conclusive proof that the whole pollution of the water was caused by the operations of the defendant's factory.

Previous to 1861, the water was fit for drinking and all domestic purposes, and every precaution had been adopted at the works of the company to exclude all impurities. There was, therefore, no right gained by user to pollute the water, so as to unfit it for drinking, before that period; the actual pollution afterwards is unprotected by prescription, and was simply both a public and a private nuisance. This is the true view, as appears by the large number of consumers, who never would have taken it if it had been unfit for drinking and domestic purposes.

Chief Justice Erle says, in *Smith v. Thackerah*, 35 L. J., N. S., Com. P. 276: "Where there is an actionable wrong,

such, for instance, as a person stepping on another man's land, or a returning officer refusing a vote tendered to him, or an interference with the flow of water to which a man is entitled, it is not necessary to prove pecuniary damage." But in this case there is an interference with a flow of water affecting vitally a whole community, and particularly in the advent of cholera, which may be caused, and will be certainly aggravated, by the use of foul or impure water.

This subject of the impurity of the water furnished to the citizens of the old Kensington district, from the river Delaware, was a short time ago under discussion in the city councils; and it was distinctly stated that it was the procuring cause of cholera and other diseases, which were alarmingly prevailing in those sections where the impure water is used.

In a very able article in the *Edinburgh Review* of April last, headed "Water Supply," discussing the means of supplying the metropolis and seventeen northern manufacturing towns with unexceptionable water, the effect of impure water in producing cholera is stated in very strong language, making the following extract from the report of the committee of the board of health during the cholera epidemic in London in 1853-54: —

"The present state of scientific knowledge does not justify dogmatic assertions on this subject; but there are many reasons for believing, in respect not only of cholera, but of many kindred diseases, that the means and agencies of morbid infection stand in intimate relation to decaying animal products, within and without the body, and the slightest taint of organic decomposition within the drinking-water of a large population, therefore, constitutes a danger which we cannot but regard with as much alarm as disgust." The reviewer says: "No evidence of the truth of such views could be more convincing than that which was derived from the facts relating to the visitation of cholera in London in 1853-54, when it was clearly ascertained that a very large population drinking foul water suffered from the epidemic more than three times as much as a similar population drinking cleaner water." After giving the particular facts, he continues: "In effect, then, the drinkers of foul water suffered three and a half times as much mortality as the drinkers of superior water." And the commissioners appointed to inquire into the best means of preventing the pollution of rivers, in their report of 1865 on the river Thames, use this language: "The result seems to be,

that as a water supply, the Thames, polluted with the sewage of the inhabitants of the river basin, is open in kind, if not in degree, to the same objections as well-water infiltrated by liquid from an adjoining cesspool." And in the November number of the Law Magazine and Law Review, in an article on public health, page 99, the writer says: "Let not that which should be God's choicest gift and health-giver, pure water, be by man's imperfect meddling converted into a source of poison and of death, of desolated homes and destitute orphanage."

To give, therefore, a supply of pure water to London and its three million five hundred thousand inhabitants, it is proposed to supply two hundred million gallons per day of unexceptionable water from the flanks of the mountain ranges of Cader Idris and Plynlimmon, in North Wales, from which the river Severn is supplied, and to supply the seventeen northern manufacturing towns from the lake districts of Cumberland and Westmoreland with water of the same character.

The subject of the pollution of rivers and streams is attracting great attention in England, and very important cases in relation to it have been before the English courts, the most striking and instructive of which is *Goldsmid v. Tunbridge Wells Improvement Commissioners*, decided by the master of the rolls on the 24th of November, 1865 (35 L. J., N. S., Ch. 88), and affirmed on appeal by the lords justices on the 24th of March, 1866 (Id. 382), and in 12 Jur., N. S., 308, where the report is fuller.

In this case, a brook, into which a considerable part of the sewage of Tunbridge Wells was discharged, flowed through the plaintiff's land, entering it at a distance of about one and a half miles from the town, and leaving it about four miles from the town. The evidence showed that at some time (not clearly defined) the water had been fit to drink; that it was no longer so; and that the deterioration was owing to the sewage from Tunbridge; and the master of the rolls held that the plaintiff was entitled to an injunction to restrain the defendants, who had the entire control of the sewage from Tunbridge Wells, from allowing any sewage to flow into the brook so as injuriously to affect the waters on the plaintiff's land, although the sewage there did not as yet amount to an absolute nuisance.

"I am of opinion," said Sir John now Lord Romilly, "that it is impossible for any one to read this evidence and not to come to the conclusion, first, that the property of the plaintiff

is seriously injured by the pollution of the stream; secondly, that this pollution is occasioned by the sewage discharged from Tunbridge Wells into the brook; and thirdly, that it has been of slow and gradual growth, that it has increased and is now increasing, and that in process of time the stream will become an absolute nuisance to all those who reside on its banks, or who reside in the immediate vicinity of it."

In speaking of the gradual increase of pollution, the learned judge said: "If he comes to court and complains very early, then the evidence is that it is not perceptible, it is wholly inappreciable, and you get evidence after evidence for the defendant (though there may be only a very slight pollution, and perhaps only observable at some times and on some occasions), saying, 'You have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance.' Then he waits for five or six years, until it is obvious to everybody's sense that the pollution is considerable, and then they say: 'You have come too late; you have allowed this to go on for twenty years, and we have acquired an easement over your property, and a right of pouring the sewage into it.' My opinion is, that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that watercourse, has a right to come here and stop it; and that where the pollution is increasing, and gradually increasing from time to time by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him.

"Although in this case I have only to consider an injury to a private individual, yet I believe the injury to the public may be extremely great by polluting a stream, the water of which cattle are in the habit of drinking, which persons who reside on the banks must necessarily inhale from time to time, and this at a time when the attention of the public and the court (although it is not given in evidence) is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle, and great contagious diseases affecting human beings, such as cholera, typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible, in that state of things, to say what amount of

injury may be done by polluting even partially a stream which flows through a considerable distance." After speaking of the removal of the pollution, he says: "That that is feasible, and is easily attainable by ordinary means and little expense, the court has found in many cases, and then the sewage becomes an advantage instead of being a nuisance."

In the court of appeal, the prescriptive right was laid aside by the court, and it was of opinion that it was a nuisance, and also a prospective nuisance of a permanent character. "The defendants also," said Lord Justice Turner, "relied much upon the case of *Elmshirst v. Spencer*, 2 Macn. & G. 45; but that case seems to be quite distinguishable from the present. As I understand it, the court was of opinion that there having been no trial at law, which was necessary according to the then course of the court, the nuisance was not established; and further, that no injury was proved; but in this case I think there is proof both of the nuisance and of the injury."

The case of *Elmshirst v. Spencer*, *supra*, was decided in 1849, and the *syllabus*, which is a fair representation of the decision of Lord Cottenham, is in these words: "A court of equity will not exercise its jurisdiction by injunction at the instance of an individual against an alleged nuisance without a previous trial at law, or without its being clearly proved that the plaintiff has sustained such substantial injury as would have entitled him to a verdict for damages in a court of law,"—the last clause using the very language of the lord chancellor in a condensed form.

By the act of 15 & 16 Vic., c. 86, to amend the practice and course of proceeding in the high court of chancery, passed the 1st of July, 1852, it was made unlawful for the court in any cause or matter to direct a case for the opinion of any court of common law, but the said court shall have full power to determine any questions of law which in the judgment of the said court of chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties; and the sixty-second section allowed the court, in cases where, according to the then practice of the court of chancery, such court declines, to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law; the said court may itself determine such title or right without requiring the parties to proceed at law to establish the same: 3 Chitty's Statutes, 897, 898.

By the act of 14 & 15 Vic., c. 83 (August 7, 1851), establishing the court of appeal, it was provided that the lords justices, master of the rolls, and the vice-chancellors might sit, with the assistance of a common-law judge, upon the request of the lord chancellor: 3 Chitty's Statutes, 874; and by the act of 21 & 22 Vic., c. 27 (June 28, 1858), cited as "The Chancery Amendment Act 1858," the court were allowed to assess damages in cases of injunction and specific performance, either in addition to or in substitution for such injunction, or specific performance, and such damages may be assessed in such manner as the court shall direct, and the court are authorized to cause them to be assessed, or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the court itself: Id. 916; and by the fifth section, the court may try these questions of fact and assess the damages before the court itself without a jury: Id. 917.

By the chancery regulation act of 1862, 25 & 26 Vic., c. 42 (July 17, 1862), it is enacted that "in all cases in which any relief or remedy within the jurisdiction of the said courts of chancery respectively is or shall be sought, in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or facts cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same court": 3 Chitty's Statutes, 921.

The lords justices, on appeal from Stuart, V. C., on the 4th of December, 1862, held that the court of chancery can no longer send a case to be tried at law: *Re Hooper's Estate*, 32 L. J., N. S., Ch. 55; S. C., 7 L. T., N. S., 843. On the 31st of January, 1859, immediately after the passage of the chancery amendment act of 1858, the master of the rolls held, in cases requiring a jury under it, the practice of the court in granting issues would be followed. Before the hearing, the court will not summon a jury without the consent of the defendant.

"It would be necessary," said the master of the rolls, "to hear the case upon the evidence to determine whether it would be necessary to require the assistance of a jury. There must be a ground for the application; it cannot be made *ex parte*. The 21 & 22 Vic., c. 27, has enabled the court to do by a jury what it formerly did by issue. The practice, therefore, of the

court in granting issues must be followed. Then, after answer, if counsel on both sides state that the facts are so complicated, or that the testimony is so conflicting, that it would be impossible satisfactorily to decide the question without an issue, the court will immediately make the order": *George v. Whitmore*, 28 L. J., N. S., Ch. 720.

"We suppose it well established as a rule of chancery," says Chief Justice Shaw, "that on a hearing, an issue to try a matter of fact will be ordered or not according to the sound judicial discretion of the court": *Ward v. Hill*, 4 Gray, 595; see also *Crittenden v. Field*, 8 Id. 626.

"In a controversy about matter of fact, the court of chancery, if it have jurisdiction, may direct an issue to try the fact by a jury, although a verdict is not, perhaps, indispensable, and the court might itself find the fact. The court directs an issue for the better information of its conscience. If fully satisfied as to the evidence, they will not send it to a trial at law": *Per* Parker, C. J., in *Tappan v. Evans*, 11 N. H. 311. In *Black v. Lamb*, 12 N. J. Eq. 113, Chancellor Williamson said: "Certainly no appeal would lie from an order of the court directing an issue, or for refusing one, on the application of either party." The whole is a matter of judicial discretion; and the tendency of modern times is opposed to the increased length of litigation caused by the practice of directing issues: *Bassel v. Johnson*, 2 Id. 417 (1836); 2 Daniell's Chancery Practice, 1086, Perkins's 3d Am. ed., 1865.

Notwithstanding the evident policy of a court, when it once obtains jurisdiction of any cause, dealing with the whole matter by its own power, and by judicial machinery belonging to itself exclusively, the equity bar in England resisted to the utmost the introduction of trial by jury into the court of chancery. This opposition grew out of the entire division and separation of the English barristers into two distinct professions, the common-law bar and the equity bar. The latter were entirely ignorant of the practice in trials by jury, and particularly in the *viva voce* examination and cross-examination of witnesses in open court, a branch of the practice requiring a thorough schooling and great practical skill and acuteness. A strong example of this occurred in the trial of the directors of the British Bank, when the attorney-general, Sir Richard Bethell (now Lord Westbury), the acknowledged leader of the equity bar, substituted Sir Frederick Thesiger, of the common-law bar, to perform a duty which

devolved on him as representing the crown in all criminal cases. This case was a remarkable one, as a change of ministry occurred during the trial, and Sir Frederick, being appointed lord chancellor and a peer of the realm, by the title of Lord Chelmsford, was, of course, obliged to return his brief and his fees.

The unwillingness of the equity bar, and perhaps of the equity judges, unaccustomed to trials by jury, which, when issued were directed to a common-law court, were tried by a common-law judge and a common-law bar, no doubt caused the chancery regulation act, 1862, and the preamble to it is strong evidence of the necessity of forcing the court of chancery finally to dispose of all its own litigation within its own walls.

"Whereas," says the preamble, "the high court of chancery has power in certain cases to refuse or postpone the application of remedies within its jurisdiction until questions of law or fact on which the title to such remedy depends have been determined or ascertained in one of her majesty's courts of common law; and whereas it is expedient that the said power should no longer exist, and that in all such cases every question of law and of fact cognizable in a court of common law arising in the said court of chancery, on which the right of any party to any relief or remedy depends, and whether the title to such relief be or be not incident to or dependent upon a legal right, should be determined by or before the said court itself," which was then followed by the first section above quoted.

The very able opinion of Lord Westbury in *Fernie v. Young*, in the house of lords, on the 24th of April last, 14 L. T., N. S., 637, gives a very succinct but satisfactory view of the old practice of the court of chancery in such cases, and the effect of the acts of 1858 and 1862 in abolishing it, and obliging the court to decide all questions of law and fact without referring either one or the other to any other tribunal.

The case of *Holsman v. Boiling Spring Bleaching Company*, decided at May term, 1862, by Chancellor Green, and reported in 14 N. J. Eq. 335, in a case on all fours with the one before us, shows the settled practice of the court of chancery of New Jersey in such cases.

The injunction asked for and granted on final hearing was to restrain the defendants from polluting a stream of water which ran through the plaintiff's land, by emptying into it

the chemicals and other noxious substances used by the defendants in their bleaching operations.

"Every owner of land," said the chancellor, "through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course without obstruction, diversion, or corruption. The right extends to the quality as well as the quantity of the water. The court of chancery has a concurrent jurisdiction with courts of law, by injunction, equally clear and well established in cases of private nuisances, and it is a familiar exercise of the power of the court to prevent by injunction injuries to watercourses by obstruction or diversion.

"A disturbance or deprivation of that right [to the use and enjoyment of the water in its natural state] is an irreparable injury for which an injunction will issue.

"Where the nuisance operates to destroy health or to diminish the comfort of a dwelling, an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction.

"It is urged that the right of the complainant is not clear, and must therefore be fully established at law before an injunction will issue. Where the complainant seeks protection in the enjoyment of a natural watercourse on his land, the right will ordinarily be regarded as clear; and the mere fact that the defendant denies the right by his answer or sets up title in himself will not entitle him to an issue before the allowance of an injunction."

After stating the claim of right to pollute the stream as far back as 1814, by the establishing a mill on defendant's premises, used for fulling, dyeing, and sawing, the chancellor continues: "But admitting the fact to be clearly established that a fulling and dyeing mill and saw-mill were upon the premises as early as 1814, and were continuously used for twenty years, it does not sustain the claim of an adverse right set up by the defendants. The nuisance complained of is not the existence of the mill nor its immediate operation. The mill as at present used is not driven by the water of the stream. Its motive power is steam. The complaint is, that chemicals and other foreign and offensive matter is discharged into the stream at the defendant's works, of such character and in such quantity as to render the water of the stream on the lands of the complainant unfit for household uses, and for

other purposes to which it was applied by the complainant. The existence of the defendant's mill, or the discharge of dyeing materials or drugs into the stream on the defendant's lands, constitutes no injury to the complainants if their usufructuary right to the stream is not interfered with. The defendants have a right to use the water upon their own soil, in such manner as they may deem for their interest, provided they discharge it upon the soil of the complainants in its accustomed channel, pure and unpolluted. They can therefore acquire no right by prescription until they show that the acts which are claimed to constitute the adverse user injured the complainants and gave to them or those under whom they claim title a right of action. The very ground of title by adverse enjoyment is that the party against whom it is set up has so long permitted the adverse enjoyment and failed to vindicate his rights that the presumption of a grant is raised. But there can be no such presumption, and consequently no title by adverse enjoyment where no violation of a right is shown to exist. Thus where an action is brought for overflowing the plaintiff's land by backwater from the defendants' mill-dam, it establishes no title by adverse enjoyment to prove that the defendants' mill has been in existence over twenty years, or that the dam has been in existence for that period. The question is not how high the dam is, but how high the water has been held,—whether it has been held for twenty years so high as to affect the land of the plaintiff as injuriously as it did at the time of the action brought.

“To prove, therefore, that there was a fulling and dyeing mill or other manufactory for twenty years on the defendants' land, and that they discharged drugs and dye-stuffs into the stream during that period, proves nothing, unless it is shown that the materials discharged into the stream were of such character and of such an amount as to pollute the waters which flowed upon the complainants' land and rendered it unfit for use. If the evidence stops short of that, it proves no adverse enjoyment in the defendants or those under whom they claim. I find no such evidence in the cause.

“Again, it is a familiar principle, as applied to the doctrine of adverse enjoyment, that the right acquired must be commensurate with the extent of the enjoyment. The extent of the right is to be measured and regulated by the extent of the enjoyment upon which the right is founded. . . . The right

acquired must be commensurate in character and extent with the enjoyment.

"Looking alone to the legal rights of these parties, and to the well-settled principles of courts of equity in the exercise of its protective powers for the maintenance of those rights, I think the complainants are entitled to an injunction."

I have made these large extracts from this very valuable opinion of Chancellor Green because they apply so directly to the present case, and dispense entirely with any labored vindication of the action of the court below, which is one of both law and equity, presided over by the same judges, who, of course, are competent to decide any question of law, and who, if they deemed an issue to try a fact necessary, would be the tribunal to try it.

The judges of the court of common pleas, being judges both in common law and equity, and the same being true of the judges of the supreme court, whether sitting in bank or at *nisi prius*, who have remodeled their equity rules upon the improved practice of the English court of chancery, there can be no reason, in a plain case like the present, where there is no actual dispute either of law or fact, why it should not be finally decided by this tribunal upon the case before them.

I have gone over the whole ground and examined the stream and the works for my own satisfaction, and am entirely satisfied that the whole of the pollution of the stream proceeds from the discharge of foul matter into it from McCallum's factory.

The dam and works are situated in a romantic and sequestered dell, and the distance from them to the stand-pipe is 1,203 feet; height of the bottom of stand-pipe above surface of dam at engine-house, 131 feet; distance from the stand-pipe to the reservoirs at Mt. Airy, 11,535 feet; height of water in stand-pipe above bottom, 123 feet; head of water on reservoirs from stand-pipe, 25 feet; diameter of main from works to the stand-pipe, 10 inches; diameter of main from stand-pipe to the reservoirs, 10 inches; diameter of distributing main from the reservoirs, 10 or 12 inches.

These are the works which the court below have protected by a perpetual injunction.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PREScriptive RIGHT TO OVERFLOW LANDS: *Williams v. Nelson*, 34 Am. Dec. 45, 51, note; *Seidensparger v. Spear*, 35 Id. 234, and note 239; *Wilcoxon v. McGhee*, 54 Id. 409; *Snowden v. Vilas*, 81 Id. 370.

EASEMENT ACQUIRED BY PRESCRIPTION IS RESTRICTED to the extent of the user: *Wright v. Moore*, 82 Am. Dec. 731.

OWNER OF LAND MAY ERECT OBSTRUCTION THEREON TO PREVENT INFLUX OF FOUL WATER from adjoining premises: *Beard v. Murphy*, 86 Am. Dec. 693.

RIPARIAN PROPRIETOR CANNOT USE STREAM TO INJURY OF THOSE BELOW: *Dilling v. Murray*, 63 Am. Dec. 385, and note 389; *Wheatley v. Chrisman*, 64 Id. 657, and note 661.

RIPARIAN PROPRIETOR'S RIGHT TO USE AND DETENTION OF WATER: *Davis v. Getchell*, 79 Am. Dec. 636, and extended note 638; *Lobdell v. Simpson*, 90 Id. 537; *Merrifield v. Lombard*, 90 Id. 172.

THE PRINCIPAL CASE IS CITED and distinguished as to the point that a stream of water may not be fouled by the introduction into it of any foreign substance, to the damage and injury of the lower riparian owners, in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 155, 157.

BAUGH v. KIRKPATRICK.

[54 PENNSYLVANIA STATE, 84.]

FACTOR WHO HAS MADE ADVANCES TO HIS CONSIGNOR MAY PROCEED TO SELL, notwithstanding the service of an attachment, sued out by a creditor of the consignor. The attaching creditor cannot arrest a sale without tendering to the factor the amount of his advances.

EXECUTION CREDITOR CANNOT TAKE GOODS OUT OF PAWNEE'S POSSESSION without tendering him the money for which he holds them in pledge.

SCIRE FACIAS in foreign attachment against Charles W. Kirkpatrick and others, garnishees of one Frame. The plaintiff issued a foreign attachment against Frame, under which his goods in the hands of the garnishees were attached, and they recovered judgment against the defendants. Frame had consigned the goods to the garnishees for sale, and the garnishees had made large advances thereon prior to said attachment being served; and the goods were sold by the garnishees on and after the day of the service of the attachment. The jury found what goods were in the hands of the garnishees at the service of the attachment, and that they were at the time of the trial of much greater value than at the date of sale by the garnishees. The judgment for the plaintiffs was based on the value of the goods at the date of sale, and they assigned for error that the court did not enter judgment for their value at the time of the trial, less the amount of prior claims.

J. S. Serrill, for the plaintiff.

J. W. Paul, for the defendants.

By Court, AGNEW, J. This is a foreign attachment. The defendant had consigned to the garnishees a quantity of leather for sale, on which they had made large advances before the attachment was served. It is contended the attachment arrested their power to sell, leaving the goods tied up in their hands. We cannot assent to this. We are bound to take notice of the general usages governing the contracts of factors and commission merchants. By the order to sell and advances made by the factors, an interest was acquired in the goods, with a right to sell, which could not be affected by the after attachment. It would be deleterious to trade, and the rights of those engaged in it, to hold that goods forwarded to a factor to be sold may be tied up in his hands until the creditor of the consignor is ready to proceed with his execution to convert them. In the management of the business of the present day, when all things move by steam, and time and space are almost annihilated, to compel the factor to store goods consigned to him for sale would be to impede his business, and fill the room in his warehouse which the quick movements of trade would devote to the goods of others. The attaching creditor stands upon no higher footing than his debtors in relation to the garnishee. What right would the debtor himself have to say to the garnishee, You shall not sell, without tendering him his advances and making him whole? Even an execution cannot be levied of goods in pawn, so as to take them out of the pawnee's possession, without tendering him the money for which he holds them in pledge. So here the garnishees, as factors to sell, having made advancements, had a power coupled with an interest which was irrevocable, except upon a tender of their charges. Added to the injury to them by protracted storage, a fall in price might leave their advances partially unprotected. If the plaintiff was desirous to retain the goods for an advance in price, it was his duty to furnish the money to relieve them of the lien of the garnishees, and to direct the sheriff to take them into custody. There being no fraud alleged in the sale, the court below was right.

The judgment is affirmed.

ATTACHMENT WILL NOT LIE TO AFFECT FUNDS IN HANDS OF TRUSTEE, until his accounts have been settled and the debtor's share ascertained: *Groome v. Lewis*, 87 Am. Dec. 563, and see note 568; and money in the custody of the law cannot be attached: *Lightner v. Steinagel*, 85 Id. 292, and note 296.

GARNISHEE, RIGHTS AND DUTIES OF: *Adams v. Filer*, 73 Am. Dec. 410; *Waters v. Washington Ins. Co.*, 63 Id. 451, and note 456; *Webb v. Miller*, 57 Id. 189, and note 191; rights of, should be carefully protected: *Waters v. Washington Ins. Co.*, 63 Id. 451.

NORTH PENNSYLVANIA R. R. CO. v. ADAMS.

[54 PENNSYLVANIA STATE, 94.]

COUPONS BEAR INTEREST FROM MATURITY, without proof of presentment, in the absence of affirmative evidence showing a readiness to pay at the time and place.

PAYMENT, TENDER, AND READINESS TO PAY ARE AFFIRMATIVE PLEAS, casting the burden of proof upon the defendant.

PENNSYLVANIA STATUTE REQUIRING CORPORATIONS TO PAY COUNSEL FEES OF PLAINTIFFS in suits against them, in certain cases, does not apply to a suit to recover the amount of coupons, which is defended on the ground that there had been no presentment.

ACTION against the North Pennsylvania Railroad Company to recover the amount of certain coupons of said company. The affidavit of the plaintiff, Adams, alleged that "at the time the coupons fell due the defendant was unable to pay them; that he believed they were presented for payment at the company's office, but if not, it was because it had refused to pay other coupons of the same date; and that the defendant paid one sixth of the face of the coupons first due, but no more." Copies of all the coupons were filed with the affidavit. The defendant filed an affidavit of defense, by its president, averring that he had "no knowledge, information, or belief as to the presentation of the coupons for payment, except that those first due were presented shortly after maturity, and a payment of one sixth was made; and that subsequently the coupons sued on were presented for payment, and the amount due on their face offered to the plaintiff, who refused to accept it unless interest from the maturity of the coupons was also paid." Judgment was entered for the amount of the coupons with interest, including counsel fees, under the act of May 3, 1866. The defendant assigned as error the allowance of interest on the coupons, and counsel fees.

W. R. Wister, for the plaintiff in error.

G. W. Biddle, for the defendant in error.

By Court, AGNEW, J. The affidavit of defense in this case avers no possession of funds and readiness to pay the coupons

at the time and place they were payable. The objection to the payment of interest is rested solely on the ground of non-presentation when due at the place appointed. By payment, tender, and readiness to pay are all affirmative pleas, casting the burden of proof upon the defendant. It has been decided, therefore, in this state and elsewhere, that presentation and demand at the place of payment are unnecessary to entitle the plaintiff to recover where the defendant has shown no readiness on his part to pay at the place: *Fitler v. Beckley*, 2 Watts & S. 458; *Middleton v. Boston Locomotive Works*, 26 Pa. St. 257; *Wallace v. McConnell*, 13 Pet. 136.

That coupons bear interest is decided in *County of Beaver v. Armstrong*, 44 Pa. St. 63. In the opinion of Justice Read the language used is, after demand and refusal, indicating the time of the running of interest to be from presentation. But the fact in that case was that interest was recovered from the time the coupons fell due. The fourth assignment of error shows this. The coupons never were presented in New York for payment, the county having provided no funds to meet the interest on their bonds. There being no readiness to pay averred in this case, the court below was right in allowing interest from the time the coupons fell due. The case of *Emlen v. Lehigh Coal and Navigation Co.*, 47 Pa. St. 76, was decided on the ground that the company had in bank, as found by the special verdict, cash to their credit sufficient to pay the loan to plaintiff, principal and interest, and all other accruing and payable debts of the company. There was no question as to the readiness or ability of the company to pay, but the true question was, whether a non-resident holder of a certificate of indebtedness who was abroad in Europe, and whose residence was unknown, could compel the company to pay interest after the loan fell due, not only in the absence of all proof of inability or want of readiness, but against a positive general notice to present the certificates for payment, otherwise interest after they fell due would cease. A majority of the court is of opinion that the act of the 3d of May, 1866, relative to the payment of counsel fees, is inapplicable to this case. The judgment of the court below is therefore modified by striking out the charge of \$40.89, and the judgment as thus corrected is affirmed.

erson, 89 Id. 448; *City of Pekin v. Reynolds*, 83 Id. 244; interest on, where payable: *Prettyman v. Supervisors, etc.*, 71 Id. 230, and note 236.

PAYMENT, PLEADING AND PROOF OF: *Crewe v. Bleakley*, 61 Am. Dec. 58, and note 90.

TENDER, ITS SUFFICIENCY AND EFFECT: *Moynahan v. Moore*, 77 Am. Dec. 468, and extended note 470; plea of, must aver defendant's continued readiness to pay: *Murray v. Windley*, 47 Id. 324, and note 326.

HARTMAN v. OGBORN.

[54 PENNSYLVANIA STATE, 120.]

MARRIED WOMAN CANNOT ENCUMBER HER SEPARATE ESTATE for the debt of another.

JUDGMENT OF COURT HAVING JURISDICTION OF MATTER CANNOT BE INQUIRED INTO IN COLLATERAL PROCEEDING, except for fraud in the manner of obtaining the judgment.

EFFECT OF WRIT OF SCIRE FACIAS ON MORTGAGE, when followed out to a sale, is to extinguish the equity of redemption, and transfer the estate to the purchaser as fully as it existed in the mortgagor before the mortgage.

AFTER SCIRE FACIAS ON MORTGAGE HAS RIPENED INTO JUDGMENT, the mortgage is merged in it, and is no longer open to attack.

IT CANNOT BE AVERRED AGAINST PURCHASER under a judgment, recovered after two returns of *nihil*, that the mortgage was void because it was executed by a married woman.

EJECTMENT by Hartman and wife, in her right, against the defendant Ogborn, and two others, Williams and Woolston, to recover mortgaged premises. The mortgage on the premises in dispute was executed by Mrs. Hartman in her maiden name, five days after her marriage to Hartman. The mortgagee assigned the mortgage, and the assignees issued a *scire facias* on the mortgage against Mrs. Hartman, in her maiden name, and the writ was returned *nihil*. The same plaintiffs issued an *alias scire facias* as before, which was also returned *nihil*. Judgment was then taken "for want of appearance on two returns of *nihil habet*," and the damages were assessed. On this judgment execution issued, the premises were sold, the sheriff's deed acknowledged, and the purchaser afterwards conveyed to Williams, one of the defendants. It was admitted on the trial that the plaintiffs had possession under a title in Mrs. Hartman at the execution of the mortgage. A disclaimer was entered as to Woolston, and the writ showed that the other defendants were in possession at the commencement of the action. Judgment by the court in bank in favor of the defendant's title, and the plaintiffs assigned error.

John A. Owens, for the plaintiffs.

C. E. Lex, for the defendants.

By Court, WOODWARD, C. J. Mrs. Hartman executed a bond and mortgage in her maiden name of Mary Ann Coleman, five days after her marriage to Hartman, and that these instruments were void is not to be questioned. The disability of a married woman to encumber her separate estate for the debt of another has been declared in many cases, and was repeated in respect of this very bond in *Keen v. Coleman*, 39 Pa. St. 299.

But the question upon the record has respect to the judgment upon the mortgage, rather than to the mortgage itself. The judgment was founded upon two *nihils*, returned to two *scire faciases*, an original and an *alias* writ, which issued against the mortgagor and terre-tenants. A *levari facias* was then issued upon the judgment, and the premises were sold and conveyed by the sheriff, not to the mortgagee, but to a purchaser who had no notice that the mortgagor was a married woman. Neither the judgment nor the proceedings under it have been questioned by a writ of error, a motion to open or set them aside, or in any other manner whatever, and the only question upon the trial of this cause was whether they could be impeached collaterally.

- Not only is it a general doctrine of law that the judgments of courts having jurisdiction of the matter cannot be inquired into in a collateral proceeding, except for fraud in the manner of obtaining the judgment, but several points have been ruled that are specially applicable to judgments upon *scire faciases sur mortgage*. For example, in *Nace v. Hollenbach*, 1 Serg. & R. 540, the assignee of a mortgage, having obtained judgment against the mortgagor and terre-tenant in a suit of *scire facias*, and afterwards become the purchaser of the premises at the sheriff's sale, brought ejectment against a terre-tenant, who offered on the trial to prove that the mortgage had been satisfied before the judgment, but his evidence was held to be inadmissible. In *Blythe v. Richards*, 10 Id. 261 [13 Am. Dec. 672], which was ejectment by a mortgagee who had purchased at the sheriff's sale, the defendant was not permitted to show that the *scire facias* had not been served, nor that the mortgage money, for which judgment had been recovered by default, had been paid.

In *Colley v. Latimer*, 5 Serg. & R. 211, we have the point

directly ruled that the validity of a judgment founded upon two *nihilis* to successive *scire faciases sur* mortgage cannot be impeached in a subsequent ejectment. The offer there was to show that the mortgagor was in possession of the premises when the *scire faciases* issued, and therefore was entitled to personal service; but, said this court, if the judgment of the court of common pleas was erroneous, it should have been reversed on a writ of error, but remaining in full force, this court cannot now inquire into any errors which are alleged to exist. The act of 1705, which gives the *scire facias*, does not fix the effect of two *nihilis*, but in practice they are considered equivalent to a garnishment, or a return of *scire feci* by the sheriff; and in *Warder v. Tainter*, 4 Watts, 270, a mortgagor, dead before the first *scire facias* issued, was held to be alive for the purposes of the judgment, and well served after two *nihilis* and judgment thereupon.

These cases are all striking illustrations of the conclusive effect of the proceedings upon mortgages under the act of 1705. The *scire facias* is no further a proceeding *in personam* than as it is directed against the mortgagor, or others claiming under him, which entitles them to the notice prescribed by the act of assembly, which two *nihilis* are, and for the rest, it is a proceeding *in rem* to foreclose the equity of redemption, and to convert the pledge into money. And the effect of the proceeding, says the act, shall be that the purchaser "shall and may hold and enjoy the lands with their appurtenances for such estate or estates as they were sold, clearly discharged, and freed from all equity and benefit of redemption, and all other encumbrances made or suffered by the mortgagors, their heirs or assigns." The writ must issue against the mortgagor, his heirs, executors, or administrators, and its effect, when followed out to a sale, is to extinguish the equity of redemption, and to transfer the estate to the purchaser as fully as it existed in the mortgagor at the date of the mortgage. And this transfer, be it observed, is made by the judgment and the sale thereon, not by virtue of the mortgage. What avails the objection, then, that the mortgage was null and void, or for any reason was inadequate as an instrument of transfer? The inadequacy of the mortgage might well have been urged against the suit by *scire facias*; but after that has been permitted to ripen into an unquestioned judgment, the mortgage is merged in it, and is no longer open to attack.

These proceedings upon mortgages under the act of 1705 are

to be distinguished from judgments on bond against married women, which was the case of *Dorrance v. Scott*, 3 Whart. 309 [31 Am. Dec. 509], and of *Caldwell v. Walters*, 18 Pa. St. 79 [55 Am. Dec. 592]; and also from cases of which *Knox v. Flack*, 22 Id. 337, is a type.

These were proceedings purely *in personam*, where the disability appeared of record; and in *Caldwell v. Walters*, *supra*, the purchaser had notice of the disability; but here the proceeding was principally *in rem*, and the record imputed no disability of the only person sued. Mary Ann Coleman was the mortgagor, and the purchaser had no notice that she was a married woman when she made the mortgage. She was properly sued because she was mortgagor; the process was according to the act of assembly, and the effect of the two *nihilis* was to subject her estate to sheriff's sale. As to this record, she is Mary Ann Coleman still, unmarried, and *sui juris*, just as the dead mortgagor in *Tainter v. Warder*, was made alive for the purposes of that suit. A writ of error to the judgment on the mortgage would have made the death in the one instance and the marriage in the other an available defect; but without that, the judgment stands as it was rendered.

The judgment is affirmed.

INABILITY OF MARRIED WOMAN TO CONTRACT AT COMMON LAW: *Stephenson v. Osborne*, 90 Am. Dec. 358, and cases collected in note 367; *Dobbin v. Hubbard*, 65 Id. 425, and note 432.

MARRIED WOMAN'S POWER TO CONTRACT AND BIND HER SEPARATE ESTATE therefor under statutes: *Yale v. Dederer*, 78 Am. Dec. 216, and note 226; *MacLay v. Love*, 85 Id. 133; *Rogers v. Ward*, 85 Id. 710; *Kirkpatrick v. Buford*, 76 Id. 367, and extended note.

JUDGMENT, COLLATERAL IMPEACHMENT OF: *Coit v. Haven*, 79 Am. Dec. 244, and cases collected in note 249; *Boston etc. R. R. Co. v. Sparhawk*, 79 Id. 750; *Elston v. Chicago*, 89 Id. 361; *Joyce v. McAvoy*, 89 Id. 172.

REMEDY BY SCIRE FACIAS ON MORTGAGE: *Carroll v. Ballance*, 79 Am. Dec. 354; *Martin v. Jackson*, 67 Id. 489.

THE PRINCIPAL CASE IS CITED to the point that if judgment be recovered on a *scire facias*, issued on a mortgage executed by a married woman, the judgment is conclusive that the mortgage was properly executed, and its validity cannot be collaterally questioned except for fraud, in *Michaelis v. Brawley*, 109 Pa. St. 9; *Finley's Appeal*, 67 Id. 459.

ODIORNE'S APPEAL.

[54 PENNSYLVANIA STATE, 175.]

WIFE WHO LEAVES HER HUSBAND, AND RENOUNCES ALL CONJUGAL INTERCOURSE WITH HIM for a considerable time prior to his death, is not entitled to administer his estate, nor is she in a position to object that administration was granted to one out of the state.

STATUTES ENTITLING WIFE TO ADMINISTER ESTATE OF HUSBAND, AND TO RECEIVE THREE HUNDRED DOLLARS THEREFROM, CONTEMPLATE only the case of a wife who lives with her husband till his death, and faithfully performs all her duties to his family.

APPEAL from the decree of the register's court of Chester County, confirming the decree of the register in the grant of administration on the estate of John W. Ordiorne, deceased. The register granted administration to David W. Ordiorne, a brother of the decedent, and resident of New York, against the consent of the decedent's widow, and she appealed to the register's court. The decedent and appellant, both residing in Philadelphia, were married there in 1861. They removed to Chester County in 1865, and lived unhappily together for about a year, when the appellant left home, and went to Detroit to follow the occupation of an actress, and never returned to her husband. On the hearing before the register's court, the appellant claimed the right to administer as widow; that the decedent's residence has been in Philadelphia, and administration had been granted to her there; and that the grant to the decedent's brother was in other respects contrary to law. The appeal was dismissed, and the widow appealed to this court. Other facts appear in the opinion.

J. W. Latta, for the appellant.

W. Townsend, for the appellee.

By Court, **WOODWARD, C. J.** Where a wife leaves her husband, and renounces all conjugal intercourse a considerable time before his death, she becomes not such a widow after his death as was in the contemplation of the legislature when the acts of assembly were passed which entitle her to administer his estate and to appropriate three hundred dollars of it to her own use. It has been held that desertion for more than twelve years forfeits her rights under these statutes: 2 Am. Law Reg. 510; nor is a wife within their meaning who has lived in a foreign country, and never formed part of her husband's family here: *Spier's Appeal*, 26 Pa. St. 233; nor a wife who, by

articles of separation, has relinquished all her rights in her husband's estate: *Dillinger's Appeal*, 35 Id. 357.

The acts contemplate the case of a wife who lives with her husband till his death, and faithfully performs all her duties to his family, not one who voluntarily separates herself from him, and performs none of the duties imposed by the relation.

On this ground we think the court judged soundly in denying administration to the appellant. It is denied that she deserted her husband, but it is impossible to read the letters upon our paper-books without seeing that whilst Odiorne regarded his wife with the tenderest affection and desired her society, she, on the other hand, had conceived an unconquerable disgust for him, and was determined never again to live with him. Under date of August 20, 1866, after she had gone to Detroit as an actress, she employed the following language:—

“My being away from you has fully convinced me (although I knew it before) that I could never again endure the thought of living with you,—no matter in what relation. I would sooner die than be forced to do so, and I know the law cannot force me to. . . . I do not suppose that you will view this in any kind of a reasonable light, as reason does not seem to be one of your qualities; but, John, you must listen to facts, and the thing has been reduced to this point: that man nor the devil shall force me to do against my will, let the consequences be what they may; I cannot do otherwise. I am able and willing to take care of myself, and ask no bones off of any of you. I feel that I never want to see you again, and I might as well say so.”

To this letter he returned a most affectionate expostulation, and she replied, under date of August 24th, repeating with equal emphasis her fixed resolution to live with him no more. “My decision,” she says, “is the result of calm, deliberate, and decided reflection. I feel that by doing what you wish I would be committing a crime against my own nature. I will tell you that every feeling in my nature rises in most terrible revolt and repugnance at the simple idea of ever being anything to you,—it is disgusting to me,—I swear it by all that is holy; and yet you are so selfish as to seek by your sorrow to influence my inclinations. But I repeat, you never can do it. I shall never under heaven be yours again, and you might as well, first as last, view it in a just and practical light.”

There is much more to the same effect in her letters. Now, this lady, who could defy her husband's sorrowful entreaties

to return to the duties of a wife, ought not to be so prompt to seek the rights of a wife, after driving him into a premature grave. It is to the faithful wife who lives with her husband, and sustains and comforts him as he descends into the dark valley, that the law gives rights which it withholds from her who forgets and repudiates both vows and duties.

Nor do we conceive that this woman is in a position to object that administration was granted to one out of the state. No doubt the register required satisfactory security within the state to be given, and seeing that the appellant has no right to be preferred in the administration, we see no ground for vacating the letters that have been issued.

The decree is affirmed.

MARRIAGE OF EXECUTRIX DIVESTS HER OF AUTHORITY to act under the California statute: *Teschmacher v. Thompson*, 79 Am. Dec. 151.

WHERE WOMAN IS ENTITLED TO ADMINISTRATION AND RENOUNCES HER RIGHT, and recommends the appointment of another as administrator *de bonis non*, who is appointed as such without notice, and where she afterwards petitions the court for restoration, claiming that her renunciation was procured by mistake, the court, upon being satisfied of the mistake, should cancel its appointment and restore her to her right of administration, and it is error to appoint the one next entitled pending the hearing of her petition: *Thomas v. Knighton*, 87 Am. Dec. 571.

THE PRINCIPAL CASE IS CITED to the points stated in the *syllabus*, in *Hettrick v. Hettrick*, 55 Pa. St. 294.

RIGHT OF WIDOW TO ADMINISTER ESTATE OF DECEASED HUSBAND. — A wife's statutory right to administer upon the estate of her husband cannot be regarded as absolute, even though the statute imposes no restrictions or limitations upon the right. Thus, although the statute does not in terms forbid the appointment of a non-resident administrator, yet the reason and policy of the law are against it, and if the wife is a non-resident, an administrator already appointed will not, as of course, be removed in order that she may be appointed: *O'Brien's Estate*, 63 Iowa, 622. In Kentucky the fact that the widow is a resident of another state is a sufficient reason for rejecting her claim and granting the administration to another: *Radford v. Radford*, 5 Dana, 156. In California the nominee of a non-resident widow is entitled to letters in preference to the public administrator, notwithstanding her own incompetency to administer by reason of non-residence: Cal. Code Civ. Proc., sec. 1365; *Estate of Cotter*, Myrick's Prob. Rep. 179; *Estate of Robie*, Id. 226. If for any cause the widow is evidently incompetent and unsuitable to discharge the duties of the trust, it is held that she may be excluded: *Stearns v. Fiske*, 18 Pick. 24; *Thornton v. Winston*, 4 Leigh, 152; and see *Coope v. Lowerre*, 1 Barb. Ch. 145; as where she is of unsound mind: *In re Williams*, 3 Hagg. Ecc. 217; and see *O'Brien's Estate*, 63 Iowa, 622; or has eloped from her husband, or cohabited with other men in his lifetime: *Fleming v. Pelham*, 3 Hagg. Ecc. 217; *Conyers v. Kitson*, 3 Id. 556; or even where she has lived separate from her husband: *Lambell v. Lambell*, 3 Id. 568. It has however been held that separation alone, where it appears to have been by mutual

consent, does not deprive the wife of her right to administer: *Nuss v. Grove*, 27 Md. 391; and see *Reul v. Howe*, 13 Iowa, 50. But a wife divorced for adultery forfeits such right: *In re Davies*, 2 Curt. 628; and where the widow deserted her children to lead an immoral life, the court passed her over, and granted administration of her husband's effects to the guardian of the minor children: *In re Creed*, 6 Jur., N. S., 590. So, a widow who, by a antenuptial agreement, had relinquished her right to her husband's estate, in virtue of the marriage, has no right to administer upon his estate, nor to object to the validity of the probate of his will: *Maurer v. Naill*, 5 Md. 324. And where the facts and circumstances lead to the conclusion that the applicant for administration was not the widow of the decedent, his cohabitation with her being merely colorable, the application must be denied: *Byrnes v. Dibble*, 5 Redf. 383; *Davis v. Brown*, 1 Id. 259. Compare *White v. Lowe*, 1 Id. 376.

A widow entitled under the statute to administer upon the estate of her deceased husband is not disqualified by reason of her inability to read or write: *Nuss v. Grove*, 27 Md. 391. Nor are old age and physical infirmity, *per se*, disqualifications for the office: *Matter of Berrein*, 3 Demarest, 263; nor is poverty a disqualification: *Bowersox's Appeal*, 100 Pa. St. 434; S. C., 45 Am. Rep. 387; and see *Hovey v. McLean*, 1 Demarest, 396; *Shields v. Shields*, 60 Barb. 56. A good mind and sound judgment, a knowledge of the values of property, and of the practical business transactions of life, are sufficient to satisfy the requirements of the law: *Bowersox's Appeal*, 100 Pa. St. 434; S. C., 45 Am. Rep. 387. And the fact that the widow was illiterate, and over seventy years of age, was held to be insufficient to deprive her of her right to administer on the estate of her husband, where she appeared to have "as good business capacity as the ordinary run of farmers' wives": *Wilkey's Appeal*, 108 Pa. St. 567.

It was held in *Hettrick v. Hettrick*, 55 Pa. St. 290, citing the principal case, that a widow who had been divorced *a mensa et thoro* was not entitled to the three-hundred-dollar exemption on the death of her husband, under the act of April 14, 1851; and that to entitle her to such exemption, the family relation must exist at the husband's death, at least in contemplation of law.

SMITH v. COMMONWEALTH.

[54 PENNSYLVANIA STATE, 209.]

ATTEMPT TO COMMIT MISDEMEANOR IS MISDEMEANOR, whether the offense was created by statute or by the common law.

ACT WHICH UNEQUIVOCALLY LEADS TO CRIME CAN BE PUNISHED, either as a consummate crime or as an attempt at crime; but until an overt act is committed, the law will not detect and punish the criminal intent.

SOLICITATION OF MARRIED WOMAN TO COMMIT ADULTERY is not an indictable offense.

PRECEDENTS ARE EVIDENCE OF LAW.

SOLICITATION TO COMMIT OFFENSE IS NOT ATTEMPT, in a legal sense.

PROSECUTION for soliciting a woman to commit adultery. The substance of the charge appears in the opinion. The defendant was convicted, and a motion for a new trial, on

the ground that the indictment did not charge an indictable offense, was overruled. The defendant assigned error.

J. C. Bucher and W. C. Lawson, for the plaintiff in error.

W. Van Gezer and G. F. Miller, for the commonwealth.

By Court, WOODWARD, C. J. An attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute or was an offense at common law. These were the words of Baron Parke in the case of *Rex v. Roderick*, 7 Car. & P. 795, delivered in the year 1837. They have been adopted by the compilers on criminal law: 1 Russell on Crimes, 46; 1 Archbold's Criminal Pleading and Evidence, 19; Wharton's Criminal Law, 79, 873.

Long before 1837, to wit, in 1801, it was held in *King v. Higgins*, 2 East, 5, that to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, or that any other act was done except the soliciting and inciting. This was the case of an unsuccessful solicitation to commit a felony, and it is authority for nothing more than that such solicitation is indictable as a misdemeanor, though the language of the judges, and especially of Grose, J., went so far as to intimate that a solicitation to commit a misdemeanor was indictable. "All these cases prove," said the learned judge, "that inciting another to commit a misdemeanor is itself a misdemeanor; *a fortiori*, therefore, it must be such to incite another to commit felony."

No fault can be found with his conclusion if his premises be true; but "all these cases," to which he referred himself, were cases rather of attempts than of mere solicitations to commit misdemeanors. Thus *Rex v. Scofield*, Cald. 397, was an attempt by a man to set fire to his own house,—at that time the burning of one's own house being only a misdemeanor in England, but since made a felony by statute. The act done in that case was setting a lighted candle under the stairway, and the question was, whether the intent was to burn the house.

And in *Rex v. Vaughan*, 4 Burr. 2494, the defendant attempted to bribe the Duke of Grafton, then a cabinet minister, to give the defendant a place in Jamaica, and it was indicted as an attempt. *King v. Plympton*, 2 Ld. Raym. 1377, was another case of attempted bribery,—the offer of money to a member of a corporation for his vote.

Rex v. Johnson, 2 Show. 1, another of the authorities relied

on by the judges in Higgins's case, was nothing less than subornation of perjury, the actual putting of money into a chest to be paid to a witness upon the event of a verdict. And such, indeed, was the unreported case mentioned by the judges as having occurred before Baron Adams, at Shrewsbury, where the indictment charged an attempt to suborn one to commit perjury.

These were the cases upon which Higgins's case was ruled, and no doubt they were ample authority for the point ruled there; but do they sustain, or tend to sustain, the *obiter dictum*, that merely inciting another to commit a misdemeanor is indictable? That depends upon another question, whether there is any distinction in law and reason between an attempt to commit a crime and the inciting or soliciting another to commit crime.

Long before any of the above cases were ruled, it had been decided in *Pierson's Case*, 1 Salk. 382, that one may be indicted for keeping a bawdy-house, but a bare solicitation of chastity is not indictable, and this has passed into the text of Hawkins, c. 74, and perhaps of other writers on criminal law. Here the distinction betwixt attempt and solicitation is sharply drawn. Keeping a bawdy-house is an organized temptation to adultery, and a preparation of all facilities for the consummation of the crime. It is an attempt, a deliberate effort, to promote the crime, of the most unqualified significance; but so many equivocal words, looks, and gestures might be construed into solicitation, that it would be difficult to define the crime when dependent on such evidence. What expressions of the face or double *entendres* of the tongue are to be adjudged solicitation? What freedoms of manners amount to this crime? Is every cyprian who nods or winks to the married men she meets upon the sidewalk indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in the street were chaste, and what were lewd? It would be a dangerous and difficult rule of criminal law to administer.

Where an act is done which unequivocally tends to crime, the law can lay hold of it and punish it, either as a consummate crime or as an attempt at crime; as, for instance, renting a house for purposes of prostitution, as in *Commonwealth v. Harrington*, 3 Pick. 26; but until something has been done which may be called an overt act, it seems unreasonable that the law should be required to detect and punish the criminal

intent. This court said so with great emphasis in the case of *Shannon v. Commonwealth*, 14 Pa. St. 226, where it was held that conspiracy between a man and woman to commit adultery was not indictable. Conspiracy to commit adultery looks much more criminal than unsuccessful solicitation. In *Regina v. Martin*, 9 Car. & P. 215, Justice Patteson hit the distinction when he said: "It is perfectly clear that every attempt, not every intention, but every attempt, to commit a misdemeanor is a misdemeanor." To the same effect are the cases collected in Wharton's Criminal Law, 873, which have been decided under the statutes that exist in several states for the punishment of attempts to commit crimes. The attempt can only be made by an actual, ineffectual deed, done in pursuance of and in furtherance of the design to commit the offense. I would have supposed that the case of *Rex v. Butler*, 6 Car. & P. 368, would have fallen within this rule, and yet it was held there that a count was not good which charged that the defendant "did attempt to assault the said Sarah Vernon by soliciting, and persuading, and inducing her to lie down upon a certain bed in the dwelling-house of him, the said J. B., there situate, and getting upon the body of her, the said S. V.," etc. This was soliciting and persuading with overt acts, that clearly manifested the guilty intent, and if solicitation with such indubitable acts be not indictable, it is quite necessary to conclude that mere solicitation without any overt act is not indictable. It is easy to say that solicitation is an attempt, but a study of the cases will show that every case of attempt has included something more than mere solicitation, and the slightest reflection will persuade any observant man that a rule of law which should make mere solicitation to fornication or adultery indictable would be an impracticable rule; one that in the present usages and manners of society would lead to great abuses and oppressions. The morality of the law cannot undertake to regulate the thoughts and intents of the heart. The best it can do is to punish open acts of lewdness and repress indecent assaults. For the rest it must trust the people to the refining influences of Christian education.

It is time now to turn to the case upon the record. It is an indictment in two counts, both of which charge that the defendant did "solicit, incite, and endeavor to persuade" a married woman to commit fornication and adultery. Those are the efficient words, and contain the substance of the charge. There are plenty of adverbs added, but they imply only legal

inferences from what is charged. In the second count, the offense is laid as "feloniously" done; but as adultery, even when consummate, has never been treated as a felony in Pennsylvania, it was nonsense to rank solicitation to the crime higher than the crime itself. If the conviction were sustained, this word would have to be rejected as surplusage.

It is observable that no assault or overt act is charged; no writing, or picture, or indecent exposure of person, is alleged, — nothing, indeed, is suggested but mere solicitation. And the manner of this is not even hinted. It may have been by direct request, by innuendo, by argument, founded, as has sometimes happened, upon Scriptural texts and analogies, or it may have been by gay and frivolous anecdote or appeal. Possibly nothing was said, but only impure thoughts insinuated by looks or gestures. What evidence shall be sufficient to sustain such a charge? Nothing equivalent to an attempt is alleged, and of course the evidence would fall short of an attempt; and what would it consist of? We have no precedents for such a case; and as precedents are evidence of the law, the lack of them implies that the law has never undertaken to redress such an indefinite offense as is charged here. The authorities to which I have adverted yield no support to the indictment, unless we confound legal distinctions, and treat everything which may be considered as a solicitation of chastity an attempt upon chastity. In a high moral sense it may be true that solicitation is attempt, but in a legal sense it is not. And the law is as likely to be distorted by pressing it into extravagant reforms of the manners of men and women as it is by too loose an administration.

The diligence of counsel has succeeded in finding but one case — that of *State v. Avery*, 7 Conn. 267 — that goes to support the indictment. That was an information in the nature of an indictment for writing and sending to a married woman a scandalous letter, inviting her to an assignation for adulterous purposes. The court sustained the prosecution as for a libel, but added, *arguendo*, that if the letter were not a libel it was indictable as a solicitation to commit a felony, and for this Higgins's case was cited and relied upon. By the Connecticut statute, adultery is a felony, or was at the date of that case. That, then, in principle was Higgins's case over again, and is distinguishable from the solicitation charged here, which was not to commit a felony. On another ground it is distinguishable also; for the sending the letter was an overt act which

might be considered sufficient to raise the offense to an attempt to debauch a married woman, which we agree is indictable.

Various forms of malicious mischief have been held indictable in Pennsylvania, and gross or obscene language publicly uttered in the streets has been indicted; but in all such cases the overt act, not the guilty intent, constituted the offense.

Nothing being alleged in this case which can be thought to amount to an attempt upon the chastity of the wife of the prosecutor, the judgment is reversed.

AGNEW, J., dissented.

ATTEMPT TO PROCURE ABORTION, when indictable: *State v. Cooper*, 51 Am. Dec. 248.

ATTEMPT TO POISON, indictment for: *Ben v. State*, 58 Am. Dec. 234.

COMBINATION TO ACCOMPLISH ACT not in itself criminal may be indictable: *Smith v. People*, 76 Am. Dec. 780.

ADULTERY DEFINED: *State v. Weatherby*, 69 Am. Dec. 59, and note 62; indictment for, what sufficient: *Helfrich v. Commonwealth*, 75 Id. 579.

TITLOW v. TITLOW.

[54 PENNSYLVANIA STATE, 216.]

TESTAMENTARY CAPACITY — EVIDENCE. — A testator made a will after he was found to be a lunatic with lucid intervals: *held*, in a feigned issue on this will, that instructions given by him a short time before he was found lunatic, for another will, which was drawn accordingly, and which differed from that in dispute, were admissible in evidence on the question of testamentary capacity.

CHANGE OF INTENTION ON PART OF TESTATOR IN RELATION TO HIS WILL is of no importance, if there was a sound mind unconstrained; but when the question is, whether there was such a mind, such change may be adduced to aid the inquiry.

FREQUENT DECLARATIONS MADE BY TESTATOR WITHIN TEN YEARS BEFORE HIS DEATH that he liked a brother better than his other relations can have no bearing on the question of the testator's sanity.

LEGATEE UNDER PRIOR WILL IS COMPETENT WITNESS AGAINST SUBSEQUENT WILL IN CONTEST.

DECLARATIONS OF LEGATEE MADE BEFORE WILL WAS MADE, whose interests under the will are less than those under the intestate laws, are not evidence against the will, though he be a party to the issue.

SUBSCRIBING WITNESSES TO WILL MAY GIVE THEIR OPINION OF TESTATOR'S CAPACITY, without having previously testified to any facts as the ground of it, but other witnesses may not.

INQUISITION OF LUNACY FOUND IS PRIMA FACIE EVIDENCE ONLY, and not conclusive.

FINDING OF LUNACY, WITH LUCID INTERVALS, CASTS the burden of proving mental capacity on those propounding the will of the alleged lunatic.

ERROR to the court of common pleas of Philadelphia. Feigned issue, directed by the register's court, to try whether certain paper writings, namely, a will dated July 18, a codicil dated August 4, and a codicil dated August 11, 1863, were the will of Abraham Titlow, deceased. The papers were admitted to probate by the register on the 25th of June, 1864, and letters testamentary granted to David Titlow, named as executor in the will. The will gave to the testator's niece six thousand dollars and a mortgage of one thousand dollars, the residue of his estate to be distributed under the intestate laws; and the codicils gave directions to his executor as to the sale and division of his estate. Another will, dated May 30, 1863, was offered to the register for probate, but not admitted. Its execution was proved on the trial, and it was received in evidence. Joseph and John Titlow, brothers, and Hannah Fisher, a sister, appealed July 5, 1864, to the register's court, in which an issue was directed December 3, 1864, between David Titlow, plaintiff, and John and Joseph Titlow and Hannah Fisher, defendants. On the trial in the common pleas, April 30, 1866, the plaintiff proved the execution of the will, and rested. The defendants then gave in evidence proceedings in lunacy on Abraham Titlow, instituted November 21, 1863, on the petition of David Titlow. The inquisition finding lunacy with lucid intervals from June 25, 1863, was returned March 16, 1864, and David Titlow was appointed one of the committee. The jury found for the plaintiff, and the defendants assigned for error the rulings on the evidence and the answers to their points, all of which are sufficiently set forth in the opinion.

D. W. Sellers and G. M. Wharton, for the plaintiffs in error.

E. Nichols, G. W. Thorn, and W. L. Hirst, for the defendants in error.

By Court, **STRONG, J.** The principal questions submitted to the jury in this case were whether Abraham Titlow was of sound mind on the 18th of July, on the 4th of August, and on the 11th of August, 1863, when the alleged will and codicils were made, and whether those instruments were made under the pressure of undue influence. By inquisition taken in 1864 he was found a lunatic, and found to have been such from the twenty-fifth day of June, 1863, but with lucid intervals. On the trial, the defendants below, now plaintiffs in error, in order to show either mental unsoundness or undue influence, or both,

at the time when the will was made, offered to prove that in March, 1863, the testator had given instructions for the preparation of a will, making a very different disposition of his property from that made by the will in controversy; that a will was then prepared in harmony with such instructions and given to him; and that he assigned reasons for the testamentary disposition he then proposed. This offer the court overruled, and herein we think there was error.

The declarations offered were made some two months before the established lunacy, and they show a testamentary intent quite different from that which is manifested in the papers made in the July and August following. The presumption is, that in March, 1863, the testator was *compos mentis*. But some cause produced a radical change in his purposes and testamentary plans. Is not the variance between his intentions in March and his intentions in July to be considered when the inquiry is, What was his mental condition at the last-mentioned date? A change of intention is of no importance if there be a sound mind unconstrained; but when the question is whether there be such a mind, it is a circumstance that may be adduced in aid of the inquiry. That such evidence is admissible is asserted by the authorities almost without exception, and very often in this state. It will suffice merely to refer to a few: *Heister v. Lynch*, 1 Yeates, 108; *Starrett v. Douglass*, 2 Id. 46; *Irish v. Smith*, 8 Serg. & R. 573 [11 Am. Dec. 684]; *Norris v. Sheppard*, 20 Pa. St. 475. The first assignment of error must therefore be sustained.

The second assignment has less merit. It could have had no legitimate bearing upon the question whether the testator was sane in July, 1863, or free from constraint in making his will; that he had frequently said, within ten years preceding his death, that he liked his brother Joseph better than his other relations.

But we think the court erred in excluding Christiana Drum from testifying, because she was named as a legatee in a testamentary paper purporting to have been made by the testator on the 30th of May, 1863. That did not show a certain interest either in the event of this suit or in the record. At most, hers was but a contingent interest. The defeat of the probate of the paper of July did not establish as a will the paper of May. Had the verdict been for the defendants, it could not have been used to support any former testamentary disposition. In no way, therefore, was the offered witness implicated

in the legal consequences of any judgment that could be rendered in this case.

The declarations of David Titlow, offered to be proved by George Thomas, were properly rejected. True, he was the plaintiff in the feigned issue, but he was such only as a representative of those claiming interest under the will. His own interest was less than he would have taken under the intestate laws. There is then no reason why his declarations or admissions made, not while he was plaintiff, not even at the time when the alleged will was made, but at a time prior thereto, should be allowed to affect the decision of the question whether the instrument was a will.

The fifth assignment of error is hardly debatable under the practice in this state. It is settled with us that after proof of the execution of a will by the subscribing witnesses, a plaintiff who sustains a will may rest, on the *prima facies* of his case, and until the will has been assailed, before he calls witnesses to sustain the competency of the testator. It is competent to recall subscribing witnesses for such a purpose. The ruling of the court to which this exception was taken accords with every-day practice, and it is reasonable.

We are also of opinion that no error is shown in the sixth assignment. The evidence was properly received at the time it was offered, and if it were not the ruling of the court in regard to the order of evidence, is not assignable for error.

The seventh assignment is not sustained. The witness, when he gave his opinion, had detailed the conversations he had with the testator. It was in view of them and with reference to them his opinion was given. There is undoubtedly a difference between the admissibility of opinion of subscribing witnesses to a will and those of persons not subscribing witnesses. The former may be given in evidence without the facts upon which they are founded. The latter may not. But when the subscribing witnesses have testified to facts and circumstances upon which their opinions are grounded, the opinions themselves may be placed before the jury, who, having a knowledge of their groundwork, can judge of their value: *Brickner v. Lightner*, 40 Pa. St. 199; *Gibson v. Gibson*, 9 Yerg. 329; *Dunham's Appeal*, 27 Conn. 192; *Crane v. Northfield*, 33 Vt. 124. If what we have said in regard to the fifth assignment of error be correct, there is no foundation for the eighth.

Nor is there any for the ninth. That such declarations were

proper to be admitted, we have shown in our remarks upon the first assignment: See *Neel v. Potter*, 40 Pa. St. 483.

The tenth and eleventh assignments are also not sustained. The evidence admitted tends to show that when the declarations were made the testator had similar impressions to those which were upon his mind on the 18th of July, 1863. It had therefore some bearing upon the questions, what was the state of his mind on that day, and whether he had in fact been unduly influenced in favor of Mrs. Schuyler.

It was error, however, to exclude George Titlow from testifying because of his being named as a legatee in the paper dated May 30, 1863. What we have said in regard to the competency of Christiana Drum applies equally to the twelfth assignment of error.

We dismiss the thirteenth assignment with the remark that we do not perceive how the testimony offered tended to contradict the witness David H. Schuyler.

The two remaining assignments may be considered together. The plaintiffs in error requested the court to charge the jury that David Titlow is bound conclusively by the finding of the inquisition, he having promoted it, submitted to it, and accepted the office of committee founded thereon; and also, that a lunatic has no power to pass his estate in land immediately by conveyance, or mediately by will; and that after the lunacy has been established by inquisition, a lucid interval can avail nothing, unless the finding as to lunacy in general has been avoided by due course of law. These propositions the court refused to affirm, and we think correctly. The general principle is, that an inquisition of lunacy found is *prima facie* evidence in cases involving the sanity of the lunatic, and no more; such is the doctrine of all our cases. Peculiar effect is sought to be attributed to the inquisition upon Abraham Titlow, because David Titlow, the executor named in the paper of July 18, 1863, was the party who promoted it. He signed the petition for an inquest, and he was subsequently appointed the committee of the lunatic. It is not perceived that this can make any difference in the legal effects of the inquisition. But suppose it were conclusive upon David Titlow, would that establish that Abraham Titlow could not make a will on the 18th of July? The inquisition can be conclusive only of that which was found by it. Abraham was found a lunatic with lucid intervals. His ordinary condition was thus ascertained to be that of lunacy, but the inquisition

found there were times when he was not a lunatic. It was enough to throw upon those who asserted his competency to make a will on the 18th of July, 1863, the burden of showing it affirmatively, but it did not ascertain insanity on that day, —even as against Abraham himself. How could it then as against any one else? See *Harden v. Hays*, 9 Pa. St. 151; *Gangwere's Estate*, 14 Id. 417 [53 Am. Dec. 554]. In the latter of these cases it was distinctly ruled that an inquisition of lunacy finding the party a lunatic without lucid intervals was *prima facie* evidence only, and not conclusive, and a petitioner for the proceeding was not estopped from asserting the truth against it, and showing that the party had lucid intervals: See also *Hutchinson v. Sandt*, 4 Rawle, 234. Much more is a petitioner for an inquest not estopped, by an inquisition finding lunacy but with lucid intervals, from asserting the existence of such intervals. There was no error, then, in the court's refusal to affirm the points mentioned.

But as the first, third, and twelfth assignments of error are sustained, a new *venire* is ordered.

Judgment reversed, and a *venire de novo* awarded.

BURDEN OF PROOF IS ON PARTY IMPEACHING WILL FOR INCAPACITY: *Taylor v. Wilburn*, 64 Am. Dec. 186; and see *Grabill v. Barr*, 47 Id. 418, and note 422.

DECLARATIONS OF TESTATOR, WHEN ADMISSIBLE TO IMPEACH or invalidate will: *Waterman v. Whitney*, 62 Am. Dec. 71, and note 80; *Mages v. McNeil*, 90 Id. 354.

SHOWING SANITY OF TESTATOR AT TIME OF EXECUTION sustains will attacked for his insanity: *Taylor v. Wilburn*, 64 Am. Dec. 186.

RESENTMENT AGAINST CHILD, not amounting to delusion, will not vitiate will: *Lucas v. Parsons*, 71 Am. Dec. 147.

OPINIONS OF WITNESSES AS TO SOUNDNESS or unsoundness of testator's mind: *Clapp v. Fullerton*, 90 Am. Dec. 681, and cases collected in note 689; opinion must relate to the time of the testator's examination: *Rumyan v. Price*, 86 Id. 459.

INQUISITION IS NOT CONCLUSIVE OF INSANITY: *Sims v. McLure*, 70 Am. Dec. 196; effect of as evidence: *In re Gangwere's Estate*, 53 Id. 554, and note 561; *Gibson v. Soper*, 66 Id. 414.

LEGATFE IN WILL IS COMPETENT WITNESS to sustain it in probate proceedings: *Lawyer v. Smith*, 77 Am. Dec. 460.

THE PRINCIPAL CASE IS CITED to the point that when a witness, not a subscribing witness to a will, has testified to facts of his own knowledge tending to show want of testamentary capacity, he may be permitted to add his own opinion, in *Dickinson v. Dickinson*, 61 Pa. St. 405; *Pidcock v. Pidcock*, 68 Id. 151.

MERRIMAC MINING COMPANY v. LEVY.

[54 PENNSYLVANIA STATE, 227.]

BY ACT OF SUBSCRIBING TO CAPITAL STOCK OF INCORPORATED ASSOCIATION, EACH ASSOCIATE UNDERTAKES to raise his proportion of the capital as it may be called for by the directors.

WHERE DIRECTORS OF INCORPORATED ASSOCIATION ARE AUTHORIZED BY LAW TO CALL IN SUBSCRIPTION, this ordinarily implies a corresponding duty to pay.

PERSONAL LIABILITY FOR SUBSCRIPTIONS IS CREATED where the articles of association under the law contemplated a substantial capital for defined purposes, both to carry out the object of the corporation and for the protection of creditors.

PURCHASER FROM ORIGINAL SUBSCRIBER TO STOCK IS SUBSTITUTED to his obligations as well as his rights, and being accepted by the corporation as a stockholder, a privity is established between them.

BEST EVIDENCE OF RIGHTS AND DUTIES OF STOCKHOLDERS, in a suit arising under a charter of another state, are the decisions of the courts of that state.

ACTION by the Merrimac Mining Company, to the use of its assignees for the benefit of creditors, against the defendant, Levy, a share-owner. The directors called for an installment of one dollar upon every share, of which due notice was given to the defendant, but he refused to pay; and the plaintiff advertised and sold his stock for five cents a share, leaving ninety-five cents per share of the installment still unpaid. The action was brought to recover the balance of the installment. Other facts appear in the opinion. The court entered judgment for the defendant, and the plaintiff assigned error.

C. Sergeant and C. Gilpin, for the plaintiff.

G. W. Biddle, for the defendant.

By Court, STRONG, J. The plaintiffs are a Michigan corporation, and this suit is brought to recover from the defendant, who is a transferee of stock from an original subscriber, the installments on the stock called since he became a stockholder. In *Carson v. Arctic Mining Company*, 5 Mich. 288, it was ruled that one who had signed the original articles of association, and thus subscribed to the stock of a mining company organized under a law similar to that under which these plaintiffs are organized, is liable personally for installments called while he remains a stockholder. And in a later case, decided by the same court, *Merrimac Mining Co. v. Bagley*, it was held that one who had purchased stock in the company from an original subscriber is liable to pay such installments

as are called while he owns the stock. In this latter case, the law of incorporation was the same as that of the company under which the defendant held his stock. Indeed, the plaintiffs in that case and this are the same. If the decision of the Michigan court is a correct exposition of the law, the judgment in this case should have been for the plaintiffs.

We do not propose now to spend time in showing that were the defendant an original subscriber to the stock of the plaintiffs he would be personally liable for the installments called. It is quite plain, from the articles of association, taken in connection with the general mining law of Michigan, that he would. It is true, the articles contain no express promise of the subscribers to pay installments as called, but the stock is fixed at twenty thousand shares, of twenty-five dollars each. By the act of subscribing, each associate undertook to raise his proportion of the capital as it might be called for by the directors; and the directors were, by the act of the legislature, authorized to call in the subscription. A right to call ordinarily implies a corresponding duty to pay. The act also speaks of the installment called as "becoming due." This is language appropriate to an existing debt.

There is another consideration of much importance tending to show that personal liability was not contemplated. The articles of association, under the mining law, contemplated a substantial capital raised for a defined purpose. This was not only to carry out the avowed object of the corporation, but for the protection of its creditors. If the subscribers were not bound to pay for their stock, there is nothing more than a nominal capital. Certainly it was intended that creditors should have the security of a real capital to the extent of the sum named as the aggregate stock. But without saying more upon this subject, we refer to *Carson v. Arctic Mining Co.*, already cited, and to *Hartford and New Haven R. R. Co. v. Kennedy*, 12 Conn. 499. In the latter case, a subscription to the stock of a railroad company in these words, "We do hereby subscribe to the stock of the said railroad the number of shares annexed to our names respectively, on the terms, conditions, and limitations mentioned" in the resolutions of the general assembly incorporating the company, was held to amount to an assumption to pay installments as called, and this though the resolutions did not declare there should be any personal liability, but provided that the stock might be sold for unpaid requisitions: See also *Ward v. Griswoldville*

Mfg. Co., 16 Conn. 593. But if the original subscriber is personally liable for installments on his subscription called while he holds his stock, it is hard to see why a purchaser from him is not bound to pay installments called for after he has succeeded to the place of his vendor. It would seem he must be substituted to the obligations of the original subscriber as well as to his rights. He takes the stock subject to its liabilities, and being accepted by the corporation as a stockholder, a privity is established between them. Such seems to be the doctrine of most of the authorities: *Huddersfield Canal Co. v. Buckley*, 7 Term Rep. 36; *Bend v. Susquehanna Bridge Co.*, 6 Har. & J. 128; *Hartford and New Haven R. R. Co. v. Bowman*, 12 Conn. 530; and the recent Michigan case, *Merrimac Mining Co. v. Bagley*, 14 Mich. 501.

It is argued, however, that the past decisions of this court show the law to be otherwise with us, and we are referred to *Delaware & S. R. Canal Co. v. Sansom*, 1 Binn. 70. The main thing decided in that case, however, was that a declaration in the act incorporating a canal company, that if required installments on the stock were not paid as called the stock should be forfeited to the company and sold by them, did not prevent the company from maintaining a suit against the defaulting stockholder, on his promise to pay, and that though it was provided his stock should be absolutely lost to him by forfeiture. It is true, a question was also raised respecting the liability of a stockholder for installments on stock for which he had not subscribed, but of which he had become a transferee, and the court (two judges present) simply remarked those shares stood on different ground, and that he had given no express promise to pay, and that the act had made no other provision than that the shares should be subject to the payments. But it appears that the obligation of the transferee was not pressed,—it was given up.

Palmer v. Ridge Mining Co. is also cited; it is found in 34 Pa. St. 288. It certainly does bear a strong resemblance in many of its features to the present case. The decision was rested upon *Delaware & S. R. Canal Co. v. Sansom*, 1 Binn. 70, which, as we have seen, was not contested so far as respects the point now under consideration. What the provisions of the act incorporating the Ridge Mining Company were respecting the liability of subscribers to stock, the report does not inform us.

Under the by-laws there was a power in the directors to de-

clare the stock forfeited. It must be admitted, however, that there is no substantial difference apparent between that case and this. It must be held to determine the law of the precise facts then before the court. But here we have a company chartered under another law, and a law which has received a construction from the tribunal of last resort in the state that made it. In determining the duties and obligations of stockholders in this company, we think we ought to be guided by the ruling of the Michigan court. If we are not, this anomaly will be produced: some stockholders will be bound to pay installments called, and others standing in the same condition will not. Such a state of things would be unjust to those who are obliged to pay, and unjust to the creditors, if any, of the corporation. As this is a Michigan charter existing only under the laws of that state, the decisions of Michigan courts are the best evidence of the rights and duties of stockholders under it.

Judgment reversed, and judgment for the plaintiff for \$190.

CONDITIONAL SUBSCRIPTIONS TO STOCK: *Taggart v. West. Md. R. R. Co.*, 89 Am. Dec. 760, and note 772.

CONTRACT OF SUBSCRIPTION, WHEN COMPLETE: *Penobscot R. R. Co. v. White*, 66 Am. Dec. 257; *New Albany etc. R. R. Co. v. McCormick*, 71 Id. 337, and see note 340.

SALE OF STOCK FOR UNPAID ASSESSMENT: *Leweys Island R. R. Co. v. Bolton*, 77 Am. Dec. 236, and note 240.

RIGHT OF ACTION FOR ASSESSMENTS OR SUBSCRIPTIONS: *Central Railroad v. Johnson*, 64 Am. Dec. 300; *Heaston v. Cincinnati etc. R. R. Co.*, 79 Id. 430.

IT IS REMARKED in *Franks Oil Co. v. McCleary*, 63 Pa. St. 319, that the principal case was decided on a Michigan charter, and the court considered itself bound by the decisions of the supreme court of that state.

WISTAR v. McMANES.

[54 PENNSYLVANIA STATE, 318.]

WHERE BILL IS FILED FOR DISCOVERY AND RELIEF, DEFENDANT CANNOT DEMUR TO DISCOVERY ONLY, except where the discovery would subject him to a penalty, or it is immaterial or impertinent, or involves a breach of confidence which the law holds inviolate, or appertains exclusively to the defendant's title.

IN BILL FOR DISCOVERY AND RELIEF, DENIAL of the discovery is no ground for dismissing the bill. The plaintiff may make out his case without discovery.

DENIAL OF DEFENDANT'S APPLICATION TO OPEN JUDGMENTS ENTERED ON WARRANTS OF ATTORNEY, and let him in to defend on the ground of usury, is not such an adjudication as bars a resort to equity for relief.

DENIAL OF RELIEF BECAUSE OF PRIOR ADJUDICATION AT LAW IS LIMITED to cases where the party had a trial, or an opportunity of a trial, in which he might have availed himself of his equities.

SUMMARY DETERMINATION OF QUESTION RAISED BY MOTION IN COURT OF LAW is not a bar to a bill in equity, if it be an equitable question, though it be decided there is no equity.

OPENING JUDGMENT IN COURT OF LAW IS EX GRATIA; but restraining proceedings upon it, in a proper case, is of right.

APPEAL from a decree of the district court of Philadelphia. Bill filed by the complainant, Wistar, against the defendant, McManes, and one McIntyre, McIntyre being trustee and assignee of the complainant. The bill alleged in substance the conveyance by the complainant of his real estate upon certain trusts; that he took the benefit of the insolvent laws, assigned all his estate, and was discharged, and that all his estate not sold and distributed became vested by sundry conveyances, etc., in McIntyre, as trustee and assignee; that his whole estate after distribution, until February 16, 1864, consisted in certain unavailable lands, and that from 1831 to 1864 he had no other estate or income, and was reduced to great necessities; that in 1854 some of these lands were about to be sold for taxes, and being without means, he borrowed from the defendant McManes, September 5, 1854, the sum of \$500, at the usurious rate of four per cent per month; and on July 2, 1855, the further sum of \$300, at a like rate of interest, one of the conditions of the last loan being that the complainant should execute and deliver to McManes a judgment note, payable in six months, for \$1,148.22, being the principal of said loans, and interest at the rate of four per cent per month; that on the 1st of January, 1857, at McManes's request, he gave him another judgment note for \$450, for the interest, at four per cent per month, on the first judgment note; that on October 16, 1857, he gave McManes a due-bill at fifteen days for \$300, for the usurious interest on the notes; and on November 25, 1858, under threat of execution, he gave him a further promissory note for \$678, at ten days, for like usurious interest; and that the only money due to McManes were the sums of \$500 and \$300, and lawful interest thereon, which the complainant tendered to him. It was further alleged that in April, 1863, McIntyre, as assignee, sold and received the purchase-money of some of the lands, and on February 16, 1864, the court of common pleas decreed that the lands not sold should be reconveyed to complainant;

that McIntyre should settle his account, and pay the balance in his hands to complainant; that McManes took no steps to proceed at law upon the notes until the receipt of money by McIntyre, and refused to receive what was legally due, but entered judgment on the notes, and issued attachment executions, making McIntyre garnishee; that McIntyre paid \$1,000 on the notes, accepted service, and on September 21, 1863, McManes entered judgment for want of answers to interrogatories; that March 19, 1864, on complainant's affidavit, the court granted a rule to show cause why the judgments should not be opened and the defendant let into a defense, and took the deposition of McIntyre, the only person beside the complainant and McManes who knew anything about the loans; that McIntyre declared he did not know anything about the loans, and there being no other evidence, the rule was discharged; that McManes presented the judgments to the auditor to whom McIntyre's account as assignee had been referred, and claimed the whole amount, with interest, which the auditor allowed, and the exceptions to such allowance were then pending in the court of common pleas; that by reason of the fact of usury being unknown except to complainant and McManes, complainant is wholly without relief at law, and fears that execution may issue on said judgments against McIntyre, and he be compelled to pay said sum of \$2,440, and that said court of common pleas will dismiss complainant's exceptions to said report and confirm it; and the bill prayed that McManes be restrained from further proceedings on said judgments or attachments, or in any way at law against the complainant, or McIntyre, to recover the amount thereof, or that allowed to McIntyre in his account; that McIntyre be restrained from paying the same to McManes, and that the latter be decreed, upon payment to him of said \$500 and \$300, and lawful interest, less said \$1,000, to deliver up said judgment notes, due-bill, and promissory note, to be canceled, etc. McManes demurred to so much of the bill as sought a discovery; and for cause showed that it appeared by the bill that said judgments are *res judicata* by the district court sitting at law, and were still the subject of judicial investigation and determination before the court of common pleas. He also put in a general demurrer, and answered the parts of the bill not demurred to. The demurrer was sustained by the district court, and the bill dismissed, which was assigned for error.

T. E. McElroy and S. C. Perkins, for the appellant.

E. C. Quinn and W. L. Hirst, for the appellee.

By Court, STRONG, J. The bill in this case is for relief against judgment and execution in a court of law, and for discovery in aid of the relief sought. To the discovery asked for, the defendant demurs, and assigns for the reasons or grounds that the judgments are *res adjudicata* at law, and are subject to judicial investigation and determination in another court. The demurrer is addressed, not to the bill generally, nor to the relief, but exclusively to so much of the bill as seeks discovery. Such being its character, it should not have been sustained in the court below. A defendant cannot be allowed to demur to the discovery alone when the bill is for relief, and discovery as incidental to it, except for special reasons, all of which have no relation to the equity of the bill. If the discovery sought may subject the defendant to a penalty, or if it is immaterial or impertinent to the suit, or if it involves a breach of confidence which the law holds inviolate, or if the matter sought to be discovered appertains exclusively to the defendant's title, he may demur to the discovery alone. But when the bill is for relief, and for discovery in aid thereof, a demurrer to the latter for reasons that deny the whole equity of the bill is but a demurrer to the instrumentality by which relief is sought to be obtained.

Upon this subject the authorities are very numerous, and all to the same effect: Daniell's Chancery Practice, 605; Story's Eq. Pl., sec. 312, and notes 441, 546; Mitford's Eq. Pl. 184; Brightly's Eq. Jur., sec. 616; so, also, in *Brownell v. Curtis*, 10 Paige, 210, it was ruled by Chancellor Walworth that when the principle upon which the demurrer to the discovery of the truth of the allegations contained in the complainant's bill is equally applicable as a defense to the relief sought by the bill, the defendant cannot demur to the discovery only, and answer as to the relief. Such is the precise condition of this case. If the reasons assigned for the demurrer are sufficient to protect the defendant against making the discovery sought, they are equally available as a defense against the relief for which the bill prays, or any relief.

The only doubt in regard to this rule of pleading is one which might possibly grow out of our thirty-fifth rule of equity practice, which is as follows: "No demurrer or plea shall be held bad, or overruled upon argument, only because

such demurrer or plea shall not cover so much of the bill as it might by law have extended to, or because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea." But that this rule does not enable a defendant to demur to the discovery alone, when it is sought as a means to prove the facts essential to a plaintiff's case, was determined substantially by Sir L. J. Knight Bruce, in *Dell v. Hall*, 2 Younge & C. 1. Our rule is the same as the thirty-sixth English order of August, 1841, under which it was ruled in 1842, by Vice-Chancellor Bruce, that a demurrer to discovery for a cause which amounted to a defense against the relief could not be sustained.

On the argument of this case, it was insisted that the demurrer here is not to the discovery, but to the jurisdiction of the court. This is a plain mistake. It is specifically confined to "so much and such parts of the bill as seek that the defendant may answer and set forth" certain facts respecting which he is interrogated in the interrogatories, and to the remainder of the bill the defendant answered.

The reasons assigned for the demurrer are not to be confounded with the demurrer itself.

Unless, therefore, we are to disregard a well-settled rule of equity pleading, we must hold that the court erred in sustaining the defendant's demurrer. And still more. Even if the plaintiff was rightfully denied the discovery which he sought, it was no ground for dismissing the bill. The plaintiff might have made out his case without the discovery. The only order which the court could make in passing judgment upon the demurrer to the discovery was that the defendant need not answer the interrogatories to which he demurred. He sought nothing beyond this. To the remainder of the bill he put in an answer, by which, and by which alone, he sought to protect himself against the relief sought.

This is sufficient to dispose of this appeal. But the same result must be reached if we look beyond the rules of pleading, and examine the grounds assigned for the demurrer. They are not a defense against either the discovery or the relief. The judgments which are alleged to cover usurious interest, the defendant caused to be entered upon warrants of attorney accompanying the notes. The plaintiff never had an opportunity of defense. True, he applied afterwards to the courts in which the judgments were entered to open them and

let him into a defense, and his application was unsuccessful. But this does not exhibit such an adjudication of the equities between the parties as to bar a resort to a court of equity for relief. The utmost limit to which the cases have gone in denying to a plaintiff relief because of a prior adjudication in a court of law, extends no further than to cases where he has had a trial, or an opportunity for a trial, in which he might have availed himself of his equities. But what opportunity has this plaintiff ever enjoyed to defend himself against the defendant's claim for usurious interest? The judgments were obtained without trial. The plaintiff made no default, for he was never summoned. True, after the judgments were entered he made an application to the discretion of the court for an opportunity of making his defense, and it was denied. But that was not an adjudication against his defense. It was only a determination of something preliminary. It was at most a denial to him of the privilege of making use of his equity. Moreover, the summary determination of a question raised by a motion in a court of law is not a bar to a bill in equity, if the question be an equitable one, though it be decided that there is no equity. Set-off of one judgment against another is strictly a right in equity alone. Courts of law may, however, direct it. In *Simpson v. Hart*, 14 Johns. 63, where there had been a motion in a court of law to allow a set-off of one judgment against another, and the court had refused it after full consideration of all the facts and all the equities, the court of appeals in New York sustained a bill for an injunction, and ordered that the set-off be decreed. The doctrine was laid down that the decision of a court of law upon a summary application to its equity is not such a *res judicata* as to preclude chancery from examining the question. So in *Fanning v. Dunham*, 5 Johns. Ch. 122 [9 Am. Dec. 283], where a lender at usurious interest had proceeded at law, and recovered judgment on a bond and warrant of attorney, a bill for the relief of the borrower was entertained, though the court of law had granted a feigned issue to try whether there was usury, which had resulted in establishing its existence, and the court had afterwards rescinded the order granting the issue, had set aside all proceedings under it, and had allowed an execution to issue on the judgment. To the same effect is *Arden v. Patterson*, 5 Id. 44. And such I understand to be the doctrine of the English courts of equity: *Bromley v. Holland*, 7 Ves. 3. Indeed, I know of no

case of recognized authority in which it has been held that the decision of a court of law on a motion to open a judgment and let the defendants into an equitable defense, which would have been available before judgment, is a bar to a bill in equity for relief against the judgment. None such were cited in the elaborate argument of the defendant in error. And there is every reason why such a decision should not preclude a resort to a court of equity. Opening a judgment in a court of law is always *ex gratia*. Restraining a plaintiff from proceeding upon it, if the defendant has an equitable defense, and has not been guilty of laches by failing to set it up when he had an opportunity, is demandable of right.

There are very many cases in which injunctions against proceeding upon judgments obtained at law have been denied, even where the defendant had a complete defense resting upon equitable principles, and such as must have been allowed had it been set up before judgment, but they are all cases in which it appeared that the complainant had slipped his time. He had either neglected to make the defense on the trial or had failed to appear and suffered judgment to go by default. Such is not this case. The bill reveals no laches on the part of the complainant. He has done everything which it was in his power to do. He was not entitled to a bill of discovery on his motion to open the judgment. That was not a suit at law. The judgments were upon warrants of attorney, and he had no day in court. The summary disposition of his motion for a day is not, therefore, an adjudication of the matters averred in his bill.

It is argued, however, that the plaintiff might have taken defense in the attachment execution. And so he might had he not been precluded by the judgment. So long as they remained they stood in the way of his setting up the equity exhibited in his bill, and this being, so he had then no opportunity in those attachments to avail himself of the matter of which he now complains.

Nor had he in the common pleas on the distribution of the fund in the hands of McIntyre, his trustee. In that distribution those judgments concluded him. No doubt an issue might have been awarded to try how much had been paid upon them, if anything, or whether they were fraudulent as to creditors, but as against the complainant they established an indebtedness, and he could not on the trial of the issue

have been permitted to show that they were recovered on usurious contracts.

Were we then to hold that defendant may demur to the discovery alone when a bill is for relief and discovery only as incidental to relief, and demur for causes that show the plaintiff entitled to no relief, it would not help the defendant here, because the bill shows no adjudication of the matter in controversy in another tribunal, nor does it show that the matter complained of is pending in another court of equity or of concurrent jurisdiction.

We do not now enter upon the inquiry whether in this state injunctions may be granted to restrain a party from proceeding at law. The demurrer raises no such question, though it was considerably argued. We content ourselves now with the single remark that our more modern decisions do not recognize the doctrine asserted by Judge Sergeant at *nisi prius*, *Hagner v. Heyberger*, 7 Watts & S. 104 [42 Am. Dec. 220], that our courts are powerless to restrain acts contrary to equity.

The decree of the district court is reversed, the demurrer of the defendant below is overruled, and he is ordered to answer the interrogatories.

THOMPSON, J. I concur in this opinion so far as the practice is concerned, but think the bill ought to be dismissed for want of jurisdiction in the particular case.

DISCOVERY, WHEN BILL FOR WILL BE ENTERTAINED: *Bay State Iron Co. v. Goodall*, 75 Am. Dec. 219, and note 228; *Howell v. Ashmore*, 57 Id. 371.

DEMURRER TO BILL FOR DISCOVERY ON GROUND THAT ANSWERS TO INTERROGATORIES MIGHT SUBJECT DEFENDANT to a criminal prosecution will not be sustained: *Bay State Iron Co. v. Goodall*, 75 Am. Dec. 219; but compare note 228.

DEFENDANT IN CHANCERY CANNOT DEMUR TO AND ANSWER SAME ALLEGATIONS in bill at one time: *Brill v. Stiles*, 85 Am. Dec. 364.

BILL IS DEMURRABLE on ground of misjoinder of parties when: *Hinchman v. Paterson Horse R. R. Co.*, 86 Am. Dec. 252, and note 258.

UNDER GENERAL DEMURRER FOR WANT OF EQUITY, no objection for want of form can be raised: *Marsh v. Marsh*, 84 Am. Dec. 164.

FRANKFORD ETC. TURNPIKE COMPANY v. PHILADELPHIA ETC. RAILROAD COMPANY.

[54 PENNSYLVANIA STATE, 345.]

RAILROAD COMPANY MAY LOCATE ITS ROADS AND STATIONS ON SUCH ROUTE and at such points as in its judgment will be beneficial to its own and the public interest, in the absence in its charter of any prescribed limit of approach towards buildings and bridges.

EMISSION OF SPARKS FROM STACK OF LOCOMOTIVE IS NOT IN ITSELF ILLEGAL, and a loss of property adjacent to a railroad from the sparks, apart from misuse, is *damnum absque injuria*.

LAW, IN CONFERRING RIGHT TO USE ELEMENT OF DANGER, PROTECTS the person using it, except for his abuse of his privilege; but in proportion to its danger will arise the degree of caution and care he must use.

IT IS DUTY OF RAILROAD COMPANY running its engines in close proximity to buildings to use the utmost vigilance and foresight to avoid injury.

QUESTIONS OF SKILL, VIGILANCE, CARE, AND PROPER MANAGEMENT in any business are necessarily questions of fact to be referred to a jury.

RAILROAD COMPANY IS NOT LIABLE IN DAMAGES FOR DESTRUCTION OF BRIDGE by sparks from its locomotive if it used that degree of care and vigilance which the relative location of its road to other structures demanded. The exercise of ordinary care in procuring a good and safe spark-catcher, such as are in ordinary use, and approved by experienced railroad operators and mechanics, is sufficient on the part of the company.

NEGLIGENCE IS ABSENCE OF CARE according to the circumstances.

ACTION on the case for the recovery of damages for the burning by the defendant of the plaintiff's bridge. The plaintiff was a turnpike company incorporated to make a turnpike road from Philadelphia to Morrisville, and was authorized to build a bridge over Neshaminy Creek, near Bristol, which was accordingly built of wood on stone piers. The defendant located its railroad and bridge near the turnpike, the distance between the roads at the northern end of the bridge being forty or fifty yards; and it located a station about four hundred feet north of the bridge for the accommodation of the people near the bridge. Under ordinary headway, an engine would run six hundred feet with the steam shut off, but stopping at the station required putting on steam to carry the train over the defendant's bridge. After one of the defendant's trains had passed, the plaintiff's bridge was discovered to be on fire, and was destroyed. There was evidence of the emission of sparks having been seen at the time the train passed, and the fuel used was wood, and the spark-catcher on the engine was the "Yankee Stack," and the one most generally in use in the northern part of the United States. The general opinion was, that this stack was among the best arrangements for steaming

purposes, though there was evidence that others in use were more secure as to the emission of sparks. The verdict was for the defendant. The answers of the court to the plaintiff's points, the substance of which appear in the opinion, were the errors assigned by the plaintiff.

J. G. Johnson and W. F. Judson, for the plaintiff.

A. I. Fish and J. E. Gowen, for the defendant.

By Court, AGNEW, J. The duty of the defendants to provide sufficient spark-catchers for their locomotives, and the degree of care they should use in passing bridges and other structures near their track, are the two questions raised in this case. The right to use steam locomotives on their road is not questioned. No prescribed limit of approach towards buildings and bridges being alleged, the right must be conceded to the company of locating their roads and stations upon such routes and at such points as, in the judgment of the directors, would be beneficial to the interest of the corporation and of the public. The proximity of the station, and of the line of the road to the plaintiff's bridge, cannot in itself be considered a ground of legal liability, but an element only in ascertaining the degree of reasonable care to be used under the circumstances. Steam being generated by heat, and there being no known means of producing combustion without a draught of air, which carries off sparks from the fuel, the emission of sparks from the stack of a locomotive is not in itself illegal. A loss of property adjacent to a railroad from the sparks of a locomotive, apart from misuse, is therefore *damnum absque injuria*.

The law, in conferring the right to use an element of danger, protects the person using it, except for his abuse of his privilege. But in proportion to the danger to others will arise the degree of caution and care he must use who exercises the privilege. Great danger demands higher vigilance and more efficient means to secure safety; where the peril is small, less will suffice. It is undoubtedly the duty of a railroad company using such dangerous machines fired up to intense heat, and running in close proximity to our houses and valuable buildings, to use the utmost vigilance and foresight to avoid injury. The locomotive symbolizes enterprise, and attests the march of improvement and civilization; but social interests are not advanced by refusing to limit its destructive tendencies, and to protect life and property against

its misuse. It is the duty of those who use these hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves from time to time of every approved invention to lessen their danger to others.

These principles are abundantly supported by the authorities adduced on both sides, which we refer to without a particular citation here. But the difficulty arises in their practical application. Questions of skill, vigilance, care, and proper management in any business are necessarily questions of fact, and are to be referred to a jury. They depend upon the circumstances of each case. What is care in one case may be negligence in another, where the danger is greater, and more care is required. The degree of care having no legal standard, but being measured by the facts that arise, it is reasonable such care must be required which it is shown is ordinarily sufficient under similar circumstances to avoid the danger and secure the safety needed. Ordinary care is, therefore, the only rule which can be stated by a court. But as the degree of care is measured in every case by its circumstances, that which is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and that which would be ordinary care in a case of ordinary danger would be less than ordinary care in a case of great danger. With these views, we cannot controvert the proposition enunciated by the plaintiff in error, that it is the duty of railroad companies to adopt the best precautions against danger in use, and it is not sufficient for them to exercise what under circumstances of less risk would be ordinary care. But did the judge lay down a different rule in this case? We think not. He stated ordinary care to be the legal requirement; but it was that ordinary care which belonged to the circumstances of this case, not that which was sufficient in another of less risk. In his answer to the plaintiff's second point, he said if the defendants used ordinary care in view of the circumstances, it is all that is required. It was these circumstances which constituted the case before the jury. His charge therefore was, that which is ordinary care in such circumstances of extraordinary danger, if the case be such, is the care required. He was not stating a comparison of the degrees of care between circumstances of different degrees of danger, but announcing the rule for the case before the jury, to wit, that the care ordinarily sufficient to avoid the danger in like circumstances is required.

Care, according to the circumstances, being the rule, we

must not overlook what the judge said upon the particular subject to which this care related. In his answer to the first point, he said if the defendant used ordinary skill in procuring a good and safe spark-catcher, such as are most in use in the country and approved by experienced railroad operators and mechanics, they would not be required to use any other or greater skill or care in respect to the spark-catcher used by them; now, clearly this was an application of the rule to the very case before the jury, and not to one of less danger in which the care required would be less. The bridge was burnt by sparks from the passing locomotives, and the question was, whether the defendants had used the proper care and skill in providing spark-catchers for the stacks of their engines. The rule of ordinary care given by the judge was certainly up to the circumstances of the case, and not below.

The next complaint is made of the instruction that general use would justify persons in selecting such a spark-catcher of ordinary usefulness. On this point, the judge also said: "Now, this is a question of ordinary care, if these stacks are adopted on these great lines [referring to the leading railroads of this state], would it be negligence in others to go by them? Would it not be safe to follow in their footsteps? Could you attribute negligence if they did what is done in a large number of cases?" The fault which it is thought attaches to this instruction is in giving the practice of others as a guide instead of that which is proper and efficient to the purpose. But that was not the judge's meaning. He had already stated that the spark-catchers must be good and safe, and such as are approved by experience. When he spoke of the stacks in the ordinary use of the leading railroad companies, he referred to their practice, not as a rule of decision, but as a matter of evidence, assisting the jury to judge what sort is ordinarily safe. As evidence of the quality of a stack, certainly the practice and common use of many others in the same business, whose interests are deeply involved in the safety of the stack, are not to be rejected. It is not a fair or a correct interpretation of the instruction to separate the practice used as the evidence of the qualities of the stack from the absolute qualities stated, to wit, its goodness and safety as approved by experienced persons. It is to those following the same employment, whose business it is to know and whose interest it is to use the best, we must generally go to find out that which is the best. It is not everything which looks well in theory that works well in prac-

tice. In mechanical contrivances especially is it true that that which is approved by experience as the best is commonly found to be so. The language of Chief Justice Erle, in *Vicemantle v. London & N. W. Railway*, 10 Com. B. 95 (1861), is quite to the purpose, that "if the construction was that which was best adapted for those purposes, in known practical use at the time the alleged cause of action arose, the duty of the company was performed." Nor should I look to entire uniformity in practice in a matter so difficult of accomplishment as this. To secure a sufficient draught to produce combustion, and yet arrest the sparks which proceed from it, is to reconcile counteracting forces. I know no better proof of so difficult a problem than its practical accomplishment as far as it has been. When something certainly better is invented, and approved by the only true test of mechanical contrivances, practical experiment continued long enough to test its real utility, then railroad companies will be bound to adopt it.

The second question is the degree of care to be used by the defendants in passing adjacent structures. Schenk's station is between 300 and 400 yards distant from the railroad bridge over the Neshaminy Creek, and the railroad bridge was distant from plaintiff's bridge 150 feet at the Bristol end and 300 feet at the Philadelphia end. It is necessary after stopping at Schenk's station to let on steam to start the train and carry it beyond the bridge. The plaintiff's position is, that their bridge should not have been passed under steam, and that the station should not have been placed so near. But this is inconsistent with the clearly granted rights of this company to locate the route and fix the stations to suit their and the public convenience. In the absence of proof of a special motive to do injury, we must presume the location was made for proper ends, and not to do mischief. To hold, therefore, that it is improper to stop at this station, and that steam must be shut off in passing over the Neshaminy, is to abridge the proper and ordinary use of the road. The injury, in this case, did not arise from any special act of negligence, but from the customary and lawful use of the road. The cases referred to as authorities on this point are instances of departures from the customary use of the track. That use will not justify stopping to blow off steam through the mud-valves at a common crossing, where many horses pass, and are frightened by the noise; or stopping in a high wind opposite a new house in the process of building, where the burning cinders and sparks

are carried through the open doors by the wind. In these cases, the engineer might have found other and safer places to stop, and his act was not an ordinary use of the track. Negligence has been defined to be the absence of care according to the circumstances; but it certainly never has been held that steam must be shut off in passing even in close proximity to dwellings, though many lines of railroad run within a few feet of valuable houses, mills, and manufactories, and indeed through towns and cities. I know no greater protection to which a bridge is entitled than a dwelling filled with inmates.

Finding no error in the charge, the judgment is affirmed.

RAILROAD COMPANIES ARE HELD STRICTLY TO THEIR CHARTERED PRIVILEGES: *Commonwealth v. Pittsburg etc. R. R. Co.*, 62 Am. Dec. 372, and note 376.

RAILROAD COMPANY, AS WELL AS ITS DIRECTORS, IS CHARGEABLE WITH NOTICE of the time, place, and manner of the location of its road: *City of Aurora v. West*, 85 Am. Dec. 413.

DUTY OF RAILROAD COMPANY TO INTRODUCE IMPROVEMENTS in construction, apparatus, and machinery important to safety: *Smith v. N. Y. etc. R. R. Co.*, 75 Am. Dec. 305, and note 310.

LIABILITY OF RAILROAD COMPANY FOR FIRES caused by coals or sparks from locomotives: *Fero v. Buffalo etc. R. R. Co.*, 78 Am. Dec. 178, and note 185; for fire communicated by engine of another company: *Ohio etc. R. R. Co. v. Dunbar*, 71 Id. 296, note; for fire communicated to plaintiff's growing grain: *Hull v. Sacramento Valley R. R. Co.*, 73 Id. 656.

ACTIONS AGAINST RAILROAD COMPANY FOR FIRES caused by sparks from engines, — evidence: *Sheldon v. Hudson River R. R. Co.*, 67 Am. Dec. 155, and note.

DEFINITIONS OF NEGLIGENCE: *Pennsylvania R. R. Co. v. Ogier*, 78 Am. Dec. 322, and cases collected in note 327; *Davis v. Winslow*, 81 Id. 573.

NEGLIGENCE IS IMPLIED FROM ESCAPE OF FIRE FROM LOCOMOTIVE ENGINE, and the burden of proof is upon the railroad company to show that the most approved mechanical contrivances were used to prevent the escape of fire: *Bass v. Chicago etc. R. R. Co.*, 81 Am. Dec. 254, and see note 258, 259.

NEGLIGENCE OF RAILROAD COMPANY IS GENERALLY MIXED QUESTION of law and fact: *Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 49, and see cases collected in note 54.

FAIRMOUNT ETC. RAILWAY COMPANY v. STUTLER.

[54 PENNSYLVANIA STATE, 875.]

IMPLIED CONTRACT OF RAILROAD COMPANY TO CARRY PASSENGER SAFELY INCLUDES the duty of giving him a reasonable opportunity to alight in safety.

MOTHER IS NOT BOUND AT LAW TO MAINTAIN MINOR CHILD, and is not entitled to the correlative right of service.

RELATION OF MISTRESS AND SERVANT CAN BE CONSTITUTED BETWEEN MOTHER AND CHILD ONLY as it may be done between strangers in blood, except that less evidence might establish it.

MOTHER'S RIGHT TO ACTION FOR INJURY TO CHILD cannot be rested on her liability for his support under the poor laws.

ACTIONS FOR SEDUCTION ARE FOUNDED IN PURE WRONG upon the rights of the master in the person of the servant, for which trespass or case will lie.

NO LEGAL REMEDY EXISTS FOR TORTS SPRINGING FROM CONTRACT which consist in a mere omission of a contract duty, except by an action on the case, which must be by the party injured, and cannot be by the master.

MINOR IS COMPETENT TO CONTRACT FOR HIS OWN BENEFIT, but his contracting power is limited to his necessities and advantages, and his contracts cannot inure to the benefit of another.

ACTION CANNOT BE MAINTAINED BY WIDOWED MOTHER OF MINOR SON, who supports himself by his own labor, for a personal injury to him, resulting from the negligence of a railroad company to whom he had paid his fare as a passenger.

ACTION on the case brought by Elizabeth Stutler against the Fairmount and Arch Street Passenger Railway Company for an injury to her minor son, alleged to have been caused by the defendant's negligence. Other facts appear in the opinion. There was a verdict for the plaintiff, and the defendant assigned error.

S. Dickson, for the plaintiff in error.

R. E. Brown and D. P. Brown, for the defendant in error.

By Court, **WOODWARD, C. J.** This was an action by a widowed mother for an injury inflicted upon her minor son. The tort complained of did not consist in personal violence wantonly inflicted, but resulted from negligent performance of a contract which the railway company had assumed, to carry the son safely as a passenger. He entered one of their cars as it was going up Arch Street, and in the act of leaving it a premature start of the car precipitated him under another of their cars, which at the moment was passing down the street, and he was badly hurt. The proof was, that he had paid his fare. The implied contract to carry safely included the duty of giving him a reasonable opportunity to alight in safety from

the car, and if the company violated this part of their duty, it was culpable negligence for which an action would lie. But as the contract was made with the minor and for his benefit, can the mother maintain an action for the tort growing out of it? This is the only question upon the record.

The son, a young man eighteen years of age, lived with his mother, and occasionally earned money for her by small jobs of labor, and she nursed him after he was hurt, and furnished medical attendance. The evidence was sufficient had the action been by a father to establish the relation of master and servant; and it is in right of such a relation, rather than in her character of parent, that the mother claims damages in this action. There was no evidence of an express contract between the mother and son by which she was entitled to his services, and at law she has no implied right to them.

A father is bound by law to support and educate his children, and is entitled to the correlative right of service, but a mother, not being bound to the duty of maintenance, is not entitled to the correlative right of service; and the relation of mistress and servant can be constituted between them only as it may be constituted between strangers in blood, save that less evidence would perhaps be sufficient to establish it: *South v. Denniston*, 2 Watts, 477; *Leech v. Agnew*, 7 Pa. St. 21.

By the act of the 16th of June, 1836, the mother of every poor person not able to work, if she be of sufficient ability, may be charged to relieve such poor person at a rate to be prescribed by the court of quarter sessions, under pain of forfeiting a sum not exceeding twenty dollars a month; but her right to such an action as the present cannot be rested upon this contingent liability. It is true that the injury her son received increases the probability of his becoming chargeable upon her under the statute, but no liability has yet attached, and no statutory proceeding has been instituted. If the action was grounded upon such a statutory liability, it would be set forth in the declaration, and the damages would be limited to the statutory measure. In actions for seduction, where the loss of service is the gist of the action, the cases have gone very far in implying a right of service from very slight evidence of service, and that in favor of either parent, or of any one else standing in *loco parentis*. Yet in *Logan v. Murray*, 6 Serg. & R. 170 [9 Am. Dec. 422], where the daughter had come pregnant into the mother's service after the death of her father, in whose service she had been debauched, this court refused to recognize

the constructive relation of mistress and servant between the mother and daughter, though the latter was actually assisting about household duties, and the mother defrayed the lying-in expenses. And again, in *South v. Denniston*, *supra*, where the seduction took place after the death of the father and while the daughter was out at service, the mother was denied her action. But here a distinction is to be taken between torts. Actions for seduction, like actions by parents or masters for batteries, *per quod servitium amisit*, are founded in pure wrong, are willful trespasses upon the rights of the master in the person of the servant, for which, according to the English cases, either trespass or case will lie: *Destcham v. Burd*, 3 Maule & S. 436; *Woodward v. Walton*, 2 N. R. 476; *Chamberlain v. Hazlewood*, 5 Mees. & W. 515. With us the action is commonly case, *per quod*, for seduction of a daughter or injury of a son; though in *Ream v. Rank*, 3 Serg. & R. 215, and *West v. Vickers*, 44 Pa. St. 227, it was intimated that if the minor child be living in the father's house at the time the injury is done, trespass is the more proper remedy, but if out of it, case.

Torts that spring from contract, that consist in mere omission of a contract duty, are strongly distinguished from the above class of wrongs, and for these no legal remedy exists except by an action on the case, and in this class of cases the action must be by the party injured, and cannot be brought by the master or mistress. The late case of *Alton v. Midland R'y Co.*, 11 Jur., N. S., 672,* is full to the point. It was an action on the case against a railway company for carelessly carrying the servant of the plaintiff, one Charles F. Baxter, whereby he was injured and the plaintiff lost his services. Plea, that the defendants contracted with the said Baxter, and that they did not contract with the plaintiff. Demurrer to the plea. The case was very fully argued upon the authorities, and Erle, C. J., of common pleas, in the course of his opinion, said: "I take the law to be clear that where a master loses his servant's services by an act *ex delicto*, the master has a right of action for the loss he has sustained. But in all cases where the master has recovered, the injury has arisen from a wrong; and there is no instance where damages have been given in breach of a contract. Looking at all the authorities, there is not one in which the master recovered for a consequential damage in a contract between the servant and the defendant." Equally emphatic and precisely to the same effect were the *seriatim* opinions of Willes, Byles, and Smith, JJ.

It occurred to me that the only ground upon which our case could be distinguished from the above was the infancy of the servant, it not appearing that the servant in that case was an infant, and I examined several of the authorities referred to by the counsel in that case, and of which the judges spoke so confidently, without finding one where the party injured was a minor servant. It would seem, so far as I have been able to look into the English cases, that they make no account of the circumstance of infancy. And perhaps, upon principle, none ought to be made; for a minor is competent to contract for his own benefit, and as his contracting power is limited to his necessities and advantages, his contracts cannot possibly inure to the benefit of another. This young man might lawfully hire his passage by a public conveyance, and may assert all the rights accruing to him out of the contract; but it was not a contract with his mother, nor one that inured to her benefit.

The duty to carry him safely was a duty which the company owed to him; and said Byles, J., in the case cited from the Jurist: "The law is clear, and it would lead to alarming consequences if it were otherwise, that no man can bring an action for breach of duty but for a breach of duty to himself."

Thus, then, this case stands: an action by a mother who has no common-law right to the services of her son, and no special contract which constitutes her his mistress. But if she really stood in that relation to him, her action is founded upon breach of a contract to which she was a stranger, and which was not made in her service, as that in Alton's case was made in the course of the master's business. It belongs not to the category of actions for seduction, and no precedent has been shown to justify it; whilst the English judges declare that in that country, so fertile in precedents, not one exists for such an action. When to these considerations we superadd the legislation which, both in England and in this country, has been necessary to give mothers a right of action for negligence that causes the death of a child, it seems very obviously our duty to declare that the action ought not to have been sustained, and that the judgment must be reversed.

COMMON CARRIERS OF PASSENGERS MUST GIVE REASONABLE WARNING and time for passengers to alight, but are not required to warn each passenger personally: *Southern R. R. Co. v. Kendrick*, 90 Am. Dec. 332, and see note 343.

RIGHTS OF FATHER TO CUSTODY OF CHILDREN ARE PARAMOUNT to those of mother: *Magee v. Holland*, 72 Am. Dec. 341, and note 347; and the father is bound to support his children during minority: *Colebrook v. Stewartstown*, 64 Id. 275, and note 279; *Evans v. Pearce*, 78 Id. 635, and note 638; and may sue for loss of service or expenses on injury to child: *Rogers v. Smith*, 79 Id. 483, and note 485; and widowed mother of infant child may maintain an action in her own name against a railroad company for negligent injury causing the death of such child: *Ohio etc. R. R. Co. v. Tindall*, 74 Id. 259, and see note 263.

ACTION FOR SEDUCTION IS NOT MAINTAINABLE UPON RELATION OF PARENT AND CHILD, but solely upon that of master and servant: *White v. Nellis*, 88 Am. Dec. 282, and note 286.

INFANT MAY MAKE NECESSARY CONTRACTS FOR COMMENCEMENT AND PROSECUTION OF CIVIL SUIT, where, under the peculiar circumstances of the case, it is the only means by which he can procure the absolute necessities which he requires: *Munson v. Washband*, 83 Am. Dec. 151, and see note 154.

EARP v. CUMMINS.

[54 PENNSYLVANIA STATE, 394.]

REAL ESTATE BROKER IS AGENT OF VENDOR. To entitle him to commissions, there must be an employment, and his services must be the immediate and efficient cause of the bargain.

BROKER HAS NO RIGHT TO COMMISSIONS if his services fail to accomplish a sale, and after the proposed purchaser has decided not to buy, other persons induce him to do so.

LAW REGARDS ONLY PROXIMATE, and not remote, causes.

ACTION of *assumpsit* brought by Cummins against Earp to recover commissions for the sale of real estate. The facts appear in the opinion. There was a verdict for the plaintiff, and the defendant assigned for error the charge of the court.

W. H. Sutton, for the plaintiff in error.

A. Lewis Smith, for the defendant in error.

By Court, WOODWARD, C. J. We think the learned judge stated the rule of law too broadly in saying, "It is the sole business of the real estate broker to bring buyer and seller together." And again, "A mere seeing it [the property] in the catalogue of the broker, or in his advertisements, is sufficient, provided a sale takes place in consequence thereof." Too broadly, we mean, for the facts of this case; because, although the property was advertised by the broker, and the attention of the purchaser was first called to it in that way, yet the evidence was that he declined to purchase, and all negotiations for a sale were abandoned for several months,

nor was the purchase finally made until other parties again brought the property to his notice, and then Young, the purchaser, says he bought it, not in consequence of Cummins's advertisement, but by reason of this renewed recommendation by other parties. If anybody could tell how he bought, in consequence of what cause, Young himself was the proper witness, and he swore: "I was not influenced by Mr. Cummins at all in making this purchase. I did not know him in the transaction; he had nothing to do with the purchase so far as I know."

Now, a real estate broker is the agent of the vendor. There must be an employment to constitute him an agent, and his service as such, however slight, must be the efficient cause of the sale. If a mere introduction of the property to the notice of the buyer effects the sale, the broker earns his commission. An advertisement or any other service is enough if it be the immediate and efficient cause of the bargain. But if the services of the broker, whatever they be, fail to accomplish a sale, and several months after the proposed purchaser has decided not to buy he is induced by other persons to reconsider his resolution, and then makes the purchase as the consequence of such secondary or supervening influence, the broker has no right to a commission. In a certain sense it may be true that the purchase was in consequence of the broker's advertisement; but for that, the purchaser may never have looked at the property, nor entertained a thought of buying it; but the evidence in this case shows that it was at least due to another so distinct and separate a cause that it was a mistake to permit the broker to recover. The simple answer to his demand was, that if the evidence was believed, he did not cause the sale; that is, his agency was not the immediate and efficient cause of the sale, and law regards only proximate, and not remote, causes. In the language of Lord Bacon: "It were infinite for the law to judge the cause of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree. *In jure non remota causa sed proxima spectatur.*"

There is nothing in the cases cited in the argument, nor, it is believed, in others not cited, which will sustain the ruling in this case, when it is viewed as legal opinions should be viewed, not as abstractions, but in connection with the facts of the case.

The judgment is reversed, and a *venire facias de novo* is awarded.

REAL ESTATE BROKER, WHEN ENTITLED TO COMMISSIONS: See *Walker v. Osgood*, ante, p. 168, and extended note 171; when entitled to compensation from both parties: *Rupp v. Sampson*, 77 Id. 416, and note 418; *Farnsworth v. Hemmer*, 79 Id. 756, and note 758.

STOCK-BROKER, duties and liabilities: *Horton v. Morgan*, 75 Am. Dec. 311, and extended note 313.

GLONINGER v. FRANKLIN COAL COMPANY.

[55 PENNSYLVANIA STATE, 9.]

INCORPOREAL HEREDITAMENT, AND NOT EXCLUSIVE RIGHT TO ALL COAL, AND TO ANY EXTENT, IS GRANTED by a deed to a certain person, his heirs, executors, administrators, and assigns forever, of "the free right to dig coal at the coal-bed, under the foot of the mountain, on my lot, with the privilege freely to carry the coal to and from said coal-bed through my lands at all times hereafter, doing as little damage as may be in the uses aforesaid."

EJECTMENT. Andrew Wickizer, on January 1, 1808, in consideration of \$6.50, conveyed, by deed-poll, unto Edward Fell, blacksmith, his heirs, executors, administrators, and assigns forever, "the free right to dig coal at the coal-bed, under the foot of the mountain, on my lot, No. 22, in third division of lands in Wilkesbarre, with the privilege freely to carry the coal to and from said coal-bed through my lands at all times hereafter, doing as little damage as may be in the uses aforesaid." By subsequent conveyances, eleven undivided twelfths of the interest which passed by Wickizer's deed to Fell became vested in the Franklin Coal Company, and the remaining one twelfth in the plaintiffs. The case depended upon the construction of this deed. If a corporeal hereditament was granted by it to Fell, the plaintiffs were entitled to a portion thereof; but if an incorporeal hereditament was granted, ejectment could not be sustained. The court gave judgment for the defendants, and the plaintiffs sued out a writ of error.

S. Woodward, for the plaintiffs in error.

A. T. McClintock, for the defendants in error.

By Court, READ, J. This case depends upon the construction to be placed upon a deed-poll, executed by Andrew Wickizer on the 1st of January, 1808, granting, in consideration of \$6.50, unto Edward Fell, blacksmith, his heirs, executors, ad-

ministrators, and assigns forever, "the free right to dig coal at the coal-bed, under the foot of the mountain, on my lot, No. 22, in third division of lands in Wilkesbarre, with the privilege freely to carry the coal to and from said coal-bed through my lands at all times hereafter, doing as little damage as may be in the uses aforesaid."

The grantor was the owner of the whole tract and a resident of the township of Wilkesbarre, in which the land was situated, and the grantee was a blacksmith in the borough of Wilkesbarre.

This language does not bring the case within that of *Caldwell v. Fulton*, 31 Pa. St. 478 [72 Am. Dec. 760]. Caldwell reserved no interest in himself. He sold for a valuable consideration all he had in the sixteen acres, and all the coal in his other land,—I say all, because the grant is limited to no time, or quantity, or purpose, or person. Can a reservation to the grantor be implied in the face of terms so large? What room was left for the grantor? Might he mine also? Assuredly not against the consent of his alienee, for he had sold all the coal that alienee might think proper to take or cause to be taken; "an exclusive right to all the coal to be taken without limitation, except as to the point of ingress and egress, is a sale of the coal itself; and there is nothing incorporeal about coal. It is included in the definition of land, and those hereditaments only are incorporeal which are not land": *Per Woodward, J.*, Id. 478, 479.

The present case is not an exclusive right in the grantee to dig all the coal, and to any extent, and to exclude the grantor from mining also; and is therefore not ruled by *Caldwell v. Fulton*, 31 Pa. St. 478 [72 Am. Dec. 760]. It is more like the case of *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Id. 241 [72 Am. Dec. 783]. "It was not a sale of all the ore, notwithstanding the stipulation that the privilege was to be given to none else, because it was to be paid for by the ton, and of course no more was sold than should be raised. . . . The language of Lord Ellenborough, in *Chetham v. Williamson*, 4 East, 476, is, that no case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him": *Per Woodward, J.*, Id. 247.

Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, his heirs and assigns, and

the grant is therefore an incorporeal hereditament. The right in the case before us is not exclusive in form, words, or spirit, and is simply a privilege to dig coal at a specified coal-bed, and carry away the coals so taken, and not interfering in any way with the right of the owner of the land to mine *ab libitum*.

It is therefore only an incorporeal hereditament, as has been fully explained by the learned judge in the court below. Judgment affirmed.

GRANT OF MINERALS IN LAND IS GRANT OF CORPOREAL HEREDITAMENT: Note to *McClintock v. Bryden*, 63 Am. Dec. 101; *Hartwell v. Camman*, 64 Id. 448; *Caldwell v. Fulton*, 72 Id. 760; *Caldwell v. Copeland*, 78 Id. 436, 438; but the grant of a right to take minerals from land, not the exclusive right to the mineral products, is a grant of an incorporeal hereditament: Note to *McCliniock v. Bryden*, *supra*; *Johnstown Iron Co. v. Cambria Iron Co.*, 72 Id. 783, and note; and see the following, which cite the principal case to this point: *Carnahan v. Brown*, 60 Pa. St. 26; *Tinicum Fishing Co. v. Carter*, 61 Id. 36; *Marble Co. v. Ripley*, 10 Wall. 363.

LANCE'S APPEAL.

[55 PENNSYLVANIA STATE, 16.]

RIGHT OF COMMONWEALTH TO TAKE PRIVATE PROPERTY OR AUTHORIZE IT TO BE TAKEN without the owner's assent, on compensation made, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose.

PRIVATE PROPERTY TAKEN FOR PUBLIC USE MUST BE HELD in accordance with and for the purposes which justified its taking.

EXERCISE OF RIGHT OF EMINENT DOMAIN IS IN DEROGATION OF PRIVATE RIGHT, and the authority must be strictly construed. What is not granted is not to be exercised.

RAILROAD COMPANY IS NOT AUTHORIZED TO USE RIGHT OF WAY taken under the right of eminent domain for any other independent purpose than that for which it is taken.

PLAN IN ACCORDANCE WITH WHICH RIGHT OF WAY FOR RAILROAD ACROSS PRIVATE LAND WAS CONDEMNED CANNOT BE CHANGED at the pleasure of the promoter.

BILL in equity by Jameson Harvey against William Lance. The complainant alleged that he was seised in fee of a certain tract of land in Plymouth township, Luzerne County, and that the defendant was the lessee of one Freeman Thomas; that in 1834 Thomas presented a petition to the court of common pleas of Luzerne County, under the act of May 5, 1832, praying permission to construct a lateral railroad from the tunnel of his coal-bed to the slackwater navigation on the North Branch Canal, across the intervening lands of the com-

plainant, on an inclined plane twenty feet wide located upon the ground, except the last seventeen perches, which were to be raised from the ground on stilts; that Thomas, in accordance therewith, acquired a right of way over the complainant's land, and constructed the road on a descending grade from the tunnel, about sixty-five perches in length and twenty feet in width; that the road was used and kept in repair until about the year 1856, when it ceased to be used, and was suffered to remain out of repair; that the defendant had built a coal-chute upon the complainant's land, partly within and mostly without the twenty feet formerly occupied by the road, and had constructed a railroad partly within and partly without the said twenty feet, on an ascending grade from the tunnel to the coal-chute, rising at the latter place to the height of about eighteen feet above the grade of the old road; that the defendant was continuing to use the newly constructed road and the coal-chute in carrying on the business of mining and shipping coal, and in the prosecution of such business was constantly depositing large quantities of coal, coal-dirt, culm, slate, and rubbish upon the complainant's land. The complainant prayed for an injunction to restrain the defendant from the occupation and use of the lands; to compel him to remove the structures and deposits; and to make compensation for injuries done, and for further relief. The defendant filed an answer in which he admitted the construction of the railroad by Thomas as set out in the bill, and alleged that about 1852 he became the sole tenant of Thomas, repaired the road, and continued to use it until 1856, about which time he sold his right in the lease to the Mammoth Vein Coal Company; that the Lackawanna and Bloomsburg Railroad Company, in pursuance of its act of incorporation of 1852, constructed a railroad sixty feet wide passing over the complainant's land, and crossing the lateral railroad; that the grade of the Lackawanna and Bloomsburg railroad, which was the only practical one, was seven or eight feet below the level of the lateral railroad at the point where it crossed the latter; that the Mammoth Vein Coal Company and the Lackawanna and Bloomsburg Railroad Company entered into an arrangement to enable the latter to use its road for the purposes for which it was chartered, and in pursuance thereof the lateral railroad was raised several feet higher than its original grade. The defendant denied that the lateral railroad had at any time been disused and suffered to remain out of

repair, and that he or any one by his authority had constructed any railroad upon the complainant's land other than the lateral railroad constructed by Thomas; and alleged that his chute-house on the slackwater navigation had been destroyed, and that he had erected a coal-chute as mentioned in the bill, but that the whole thereof was upon land appropriated for the lateral railroad and for the Lackawanna and Bloomsburg railroad; that the coal-chute was erected by the consent of the latter company, and was used for the temporary deposits of coal transported on the lateral railroad to the Lackawanna and Bloomsburg railroad. The defendant denied that he had deposited upon the claimant's land any coal, coal-dust, etc.; but alleged that he had been employed by the Lackawanna and Bloomsburg Railroad Company in filling up and grading its strip of land, and in so doing had used culm, coal-dirt, etc. A replication was filed, and the case was referred to a master, but the master did not appear to have made a report. In January, 1865, John J. Pearson, judge of the twelfth judicial district, made a decree that all the right of Thomas, Lance, and other claimants to that part of the lateral railroad between the Lackawanna and Bloomsburg railroad and the termination at the slackwater navigation had ceased, and the same had reverted to Harvey; that all the lateral railroad outside of the twenty feet which the road was authorized to occupy should be removed; that the change of grade of the lateral railroad was illegal, and should be abated; that the coal-chute at the then termination of the lateral railroad should be removed; that all the coal, coal-dirt, and *debris* of any kind deposited by Lance or those claiming under him, between the mouth of the mine and the northern line of the Lackawanna and Bloomsburg railroad, upon Harvey's land outside of the twenty feet appropriated for the lateral railroad, should be removed; and that all the coal, coal-dirt, etc., outside of the right of way of the Lackawanna and Bloomsburg railroad, which was adjudged not to exceed sixty feet, should be removed. From this decree the defendant appealed. After argument the supreme court referred the case to a master, who reported that the grade of the lateral railroad was changed by Lance's lessees in 1856, from a descending one from the starting point at the tunnel, to an ascending one to accommodate the passage of the Lackawanna and Bloomsburg railroad, gradually rising on stilts, until at its junction with the Lackawanna and Bloomsburg railroad it was eighteen to twenty

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feet above the old road; that the road as altered continued to be used for transporting coal from the tunnel to the slack-water navigation, until the chute-house at the latter place was burned, when the new one was erected at the junction of the lateral road with the Lackawanna and Bloomsburg railroad, and that portion of the lateral road beyond was permitted to fall into disuse; and that the new chute-house was partly within the twenty feet of the lateral road, and the remainder within the sixty feet of the Lackawanna and Bloomsburg railroad. There was also a report as to the deposits of refuse coal, which it is unnecessary to notice.

L. Hakes and O. Collins, for the appellant.

H. W. Palmer, for the appellee.

By Court, THOMPSON, J. In January, 1865, a decree was made in this case by the learned judge of the twelfth judicial district, holding a special court, after hearing on bill, answer, and proofs against the defendant, covering pretty much the entire ground claimed for relief by the plaintiff's bill; from which decree this appeal was taken by the defendant.

The learned judge filed with the decree an elaborate and able opinion, both on the law and the facts. But as the case had not been sifted by a master, we referred it to one appointed by us, with authority to report on the whole case; to take further testimony if he deemed it essential to a full understanding of the controversy; to define as accurately as possible the area of plaintiff's ground covered by the dirt and *debris* from the defendant's mine, its depth and superficies, with an estimate of its amount in cubic yards; and to report to the court in bank at the ensuing October term at Pittsburg. During that term, the report was accordingly made and filed, and the case submitted without argument on the part of the appellant, printed or oral, and without filing any exception to the report, although in substance it did not materially differ from the facts which were found by the learned judge, and which were the cause of the decree appealed from, nor have any exceptions ever been filed to the master's report. However, notwithstanding these several findings of the learned judge, and afterwards of the master, we have also examined the testimony with care, and agree with them in all material points. This being the result, we shall affirm the decree, with a single suggestion as to its execution, leaving that to be carried into effect by the court below; viz., that on compliance

by the defendant with the decree in other particulars, he shall be allowed to enter a rule to show cause why that portion of it requiring the removal of the deposits of coal-dirt, slate, refuse coal, and other materials, made by the defendant and lessees or employees within the limits of the right of way of the Lackawanna and Bloomsburg railroad, should not be annulled or modified. If it be the *bona fide* intention of the railroad company to occupy and use it as the bed of a second track or siding of their road, it would not benefit the plaintiff to have it removed to be replaced by other material in order to lay such track, and an unnecessary expense to the defendant. We will not, however, modify the decree in this particular at this time, but leave it to the court below to determine, when the proper time arrives. Their proximity to the scene of action will enable them intelligently to supervise and do right in the matter.

The right of the commonwealth to take private property without the owner's assent on compensation made, or authorize it to be taken, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose,—supposed and intended to benefit the public either mediately or immediately. The power arises out of that natural principle which teaches that private convenience must yield to the public wants. This public interest must lie at the basis of the exercise, or it would be confiscation and usurpation to exercise it. This being the reason for the exercise of such a power, it requires no argument to prove that after the right has been exercised the use of the property must be held in accordance with and for the purposes which justified its taking. Otherwise it would be a fraud on the owner, and an abuse of power. Hence it is that no one can pretend that a railroad company may build private houses and mills, or erect machinery not necessarily connected with the use of their franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries, and dwellings might be made to line the sides of the road outside of the track,—a thing not to be thought of under the terms of the acquisition of the right of way. The exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private right, and the rule in that case is, that the authority is to be strictly construed: *Dwarris on Statutes*, 750; *Mayor v. Ohio & P. R. R. Co.*, 26 Pa. St. 355; *Commonwealth v. Erie & N. E. R. R. Co.*, 27 Id. 339 [67 Am. Dec. 471];

Parker v. Sunbury & E. R. R. Co., 19 Id. 211. What is not granted is not to be exercised. When, therefore, the Lackawanna and Bloomsburg Railroad Company under its charter, and the promoter of the private railroad under the act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way and facilities necessary to the efficient use of the right. They were not empowered to use the exclusive right of way granted to each for any other independent purpose than that for which it was granted. The fee remained in the private owner; and outside of the authorized use, which must be public or incidental to the public use, the proprietary right is in the original owner: *Lewis v. Jones*, 1 Id. 336 [44 Am. Dec. 138]; *Sanderson v. Haverstick*, 8 Id. 294; *Ridge T. Co. v. Stoevers*, 6 Watts & S. 378; *Redfield on Railways*, 69. Upon these principles, without further elaboration, we think the court were right in holding the defendant bound to remove the deposits of dirt placed by him or under his authority from both roads, and most assuredly from the ground covered by it outside of them.

We have before us the original petition and survey and the report of the jury for the private road in question. The former was for a road at grade, "or on the ground," excepting for the distance of seventeen perches next the river; that to be raised from the ground on stilts. The jury of view appointed by the court reported in favor of the proposed road as applied for and surveyed. That was a road on the surface,—an inclined plane all the way. In 1856 the grade was entirely changed. In place of an inclined plane from the starting-point, at the tunnel, the incline was rather in the opposite direction. The road was elevated on stilts, or timbers, beginning a short distance from the tunnel, and gradually rising from the ground until at its junction with the Lackawanna and Bloomsburg railroad it was eighteen to twenty feet above the old road, and on that structure a slope was erected from which to ship coal on that railroad. It was contended below that the defendant and his lessees had a right to take up the old road and reconstruct it in this manner. No authority for this was shown, nor can there be. The proceedings in the court at the outset, resulting in the grant of a right of way, was the charter for the road; and unless we disregard the act, there is no authority to do anything other than is provided therein. A survey is to accompany the petition for a private railroad. That shows what the petitioner asks liberty to do. The courses and dis-

tances, grades and the like, are to be laid down on the draughts; and if the road be allowed, that remains on file to define the rights acquired on the one hand and taken on the other. On this proposed plan a view is granted and damages are assessed. It cannot be maintained on any principle that, the right once granted on a proposed plan, the promoter may adopt any other. If he could, there is nothing to define his right or restrain his power, and he might pay trifling damages on one plan, and do infinite mischief to the owner of the land on another, without compensation. The whole act is against the assumption that the location as evidenced by the draught of survey and allowed by the jury may be disregarded at will. That proposition is incapable of maintenance for a moment.

Again, the original application was for a private road from the tunnel of the plaintiff in this proceeding to connect with the slackwater navigation at the river. Since 1856 this connection has been abandoned, and the connection changed to the Lackawanna and Bloomsburg railroad, and the portion between that and the river permitted to fall into disuse. If we take into consideration—what is possible to have occurred when damages were originally assessed for the right of way for this road—that the advantages to the land-owner in common with the public to pass over the road may have entered into the calculation, we perceive at once how great injustice might result from changing the road and its terminus so as to render this impracticable. Nothing of this may have occurred, but it might, and may, if we yield the right to change the construction so as to change the location in point of fact at pleasure or according to the promptings of interest on part of the road-owner. The one party being irrevocably bound by a location which takes a portion of his property from him, the rule would be unjust which would permit the other to act in regard to it as he pleases. If the latter desires a different road than that which he has got, let him apply anew to the proper source of power for authority to make it. He will not get it otherwise.

Another object of preserving a survey of the road as authorized, in addition to those already mentioned, was, that the commonwealth reserves the right to take such roads from the proprietors by paying their cost. If such a determination should occur in regard to a road situated as this, it would be a task of no little difficulty to identify it, and much greater to show any title to it.

I have not, nor did I intend to elaborate a vindication of the able opinion of the learned judge below: it needs none; but simply to express our approval a little more specially than a mere assent to the results arrived at would do.

The decree of the court below is affirmed, to be executed as suggested, at the costs of the appellant.

PRIVATE PROPERTY CANNOT BE TAKEN UNDER RIGHT OF EMINENT DOMAIN EXCEPT FOR PUBLIC USE: *Embury v. Conner*, 53 Am. Dec. 325, and note; *Sharpless v. Mayor etc. of Philadelphia*, 59 Id. 759; and see *Reddall v. Bryan*, 74 Id. 550, and note, as to what is a public use.

STATUTES AUTHORIZING EXERCISE OF RIGHT OF EMINENT DOMAIN ARE TO BE STRICTLY CONSTRUED: See *Nichols v. City of Bridgeport*, 60 Am. Dec. 636; *Bird v. Wilmington etc. R. R.*, 64 Id. 739; *Bensley v. Mountain Lake Water Co.*, 73 Id. 575, and the notes thereto. The principal case is cited to this point in *Prather v. Jeffersonville etc. R. R.*, 52 Ind. 37; *Darlington v. United States*, 82 Pa. St. 389; and see *Kier v. Boyd*, 60 Id. 34.

INTEREST ACQUIRED BY CONDEMNATION OF RIGHT OF WAY. While it is perfectly competent for a state to appropriate or authorize the appropriation of the title to land in fee for highway, railroad, or other purposes,—Cooley's Const. Lim. *558; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Challis v. Atchison etc. R. R.*, 16 Kan. 117; *Dingley v. City of Boston*, 100 Mass. 544; *Coster v. New Jersey R. R.*, 23 N. J. L. 227; *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; *Raleigh etc. R. R. v. Davis*, 2 Dev. & B. 451; *State v. Rives*, 5 Ired. 297; *Malone v. City of Toledo*, 34 Ohio St. 541; *Haldeman v. Pennsylvania Central R. R.*, 50 Pa. St. 425; *De Varaigne v. Fox*, 2 Blatchf. 95; compare *Giesy v. Cincinnati etc. R. R.*, 4 Ohio St. 308, —yet the laws for the exercise of the right of eminent domain do not as a general rule assume to go further than to appropriate the use, leaving the title in fee in the original owner. This is especially true of common highways taken for public use, in which the public have a perpetual easement; but the soil is the property of the adjacent owner for every purpose of use or profit consistent with such easement: *Peck v. Smith*, 1 Conn. 104; *Deaton v. County of Polk*, 9 Iowa, 594; *Perley v. Chandler*, 6 Mass. 454; *Stackpole v. Healy*, 16 Id. 33; *Robbins v. Borman*, 1 Pick. 122; *Makepeace v. Worden*, 1 N. H. 16; *Avery v. Maxwell*, 4 Id. 36, 37; *Mills v. Stark*, 4 Id. 512, 513; *Copp v. Neal*, 7 Id. 275, 276; *State v. New Boston*, 11 Id. 407, 409; *Baker v. Shepard*, 24 Id. 208; *Jackson ex dem. Yates v. Hathaway*, 15 Johns. 447; *Babcock v. Lamb*, 1 Cow. 238, 240; *Barclay v. Howell's Lessee*, 6 Pet. 498; and a turnpike company acquires only an easement, while the soil and freehold are in the original owner: *Adams v. Emerson*, 6 Pick. 57.

So, generally, railroads acquire but an easement under compulsory proceedings, and the fee remains in the original owner of the soil, subject to the easement: *Alabama etc. R. R. v. Burkett*, 42 Ala. 83; *Peoria etc. R. R. v. Birkett*, 62 Ill. 332, 336; *Henry v. Dubuque etc. R. R.*, 2 Iowa, 288; *Kansas Central R'y v. Allen*, 22 Kan. 285; S. C., 31 Am. Rep. 190; *Weston v. Foster*, 7 Met. 297; *Prop'rs of Locks v. Nashua etc. R. R.*, 104 Mass. 1; S. C., 6 Am. Rep. 181; *Scott v. St. Paul etc. R'y.*, 21 Minn. 322; *Cotton v. Boom Co.*, 22 Id. 372; *Blake v. Rich*, 34 N. H. 282; *Heard v. City of Brooklyn*, 60 N. Y. 242; *Lyon v. Gormley*, 53 Pa. St. 261; *Western Pennsylvania R. R. v. Johnston*, 59 Id. 290, 294; *Pittsburgh etc. R. R. v. Bruce*, 102 Id. 23; S. C., 10 Am. & Eng. R'y

Case 1; *Hasson v. Oil Creek R. R.*, 8 Phila. 556; *Quimby v. Vermont Central R. R.*, 23 Vt. 387; compare *Chicago etc. R. R. v. Patchin*, 16 Ill. 198; S. C., 61 Am. Dec. 65; *Munger v. Tonawanda R. R.*, 4 N. Y. 349; S. C., 53 Am. Dec. 384; and although in some cases it has been held that the right of the railroad to the possession is practically exclusive, giving the adjacent land-owner no right to enter and take herbage and other products of the soil, — *Jackson v. Rutland etc. R. R.*, 25 Vt. 151; *Connecticut etc. R. R. v. Holton*, 32 Id. 43; *Troy etc. R. R. v. Potter*, 42 Id. 265; S. C., 1 Am. Rep. 325, — yet it would seem on principle that such land-owner should have all rights consistent with the existence of a mere easement, as in other cases: See *Lyon v. Gormley*, 53 Pa. St. 261; *Preston v. Dubuque etc. R. R.*, 11 Iowa, 15; *Blake v. Rich*, 34 N. H. 282; *Hasson v. Oil Creek R. R.*, 8 Phila. 556; but on the other hand, the railroad is entitled, for the purpose of constructing, repairing, and using its road, to remove earth, gravel, stone, timber, and other materials from the land appropriated: *Henry v. Dubuque etc. R. R.*, 2 Iowa, 288; *Preston v. Dubuque etc. R. R.*, 11 Id. 15; *Chapin v. Sullivan R. R.*, 39 N. H. 564; S. C., 75 Am. Dec. 237; *Aldrich v. Drury*, 8 R. I. 554; S. C., 5 Am. Rep. 624; *Brainard v. Clapp*, 10 Cush. 6.

If an easement merely is acquired by the exercise of the right of eminent domain, the land returns or reverts to the owner of the soil upon the abandonment of the easement: *Hastings v. Burlington etc. R. R.*, 38 Iowa, 316; *Hooker v. Utica etc. Turnpike Co.*, 12 Wend. 371; *Jessup v. Loucks*, 55 Pa. St. 361; but it is otherwise if the fee is acquired: *Haldeman v. Pennsylvania Central R. R.*, 50 Pa. St. 425; *Rexford v. Knight*, 11 N. Y. 308.

DAMON v. BACHE.

[55 PENNSYLVANIA STATE, 67.]

NO WRONG CAN BE COMMITTED WHERE ONE PURSUES HIS LEGAL RIGHTS BY LAWFUL MEANS. If he gets ahead of others who had an equal chance with him, the law finds no fault.

JUDGMENT IN EJECTMENT IN FAVOR OF VENDOR AGAINST VENDEE, under which the land is delivered to the vendor, puts an end to the equity of a purchaser at a subsequent sheriff's sale of the vendee's equitable interest, under a judgment previously obtained, although the vendee suggested to the vendor to proceed against him for the purchase-money, which the vendor did, knowing that there were judgments against the vendee, and accordingly obtained the conditional judgment in ejectment by confession.

EJECTMENT. The court directed a verdict for the defendant on the evidence, which is sufficiently given in the opinion.

Pierce and Elliott, and H. Seymour, for the plaintiff in error.

J. N. Bache, for the defendant in error.

By Court, THOMPSON, J. No wrong can be committed where one pursues his legal rights by lawful means. If he gets ahead

of others in the race who had an equal chance with him, the law finds no fault, for one of its maxims is, *Vigilantibus non dormientibus legis subveniunt*.

All that can be justly said of the defendant, Bache, is, that he was vigilant. His title protects the other defendants. Landis, under whom the plaintiff claims, bought the land in question from Bache as agent of the owner in 1847, and paid down \$35, and agreed to pay the balance in four years, and never paid but \$42 until the year 1860. At that time Bache had become the owner of the legal title, and on settling with Landis, \$450 was found due, and it was then agreed that the latter should have the land if he paid for it in annual installments, in four years, with interest. He failed to pay the installments; and after two or more had fallen due, Bache brought ejectment to enforce payment. The writ was issued in May, 1862, and on the 21st of July following, by stipulation filed, the defendant Landis confessed judgment to plaintiff for the land, to be released on payment of the purchase-money by installments, extending through a period of eighteen months. After the first installment fell due, Bache issued a *habere facias* for the land, and it was delivered to him. In 1863 the land was seized and sold as the property of Landis, on a judgment obtained in 1860; and in 1864 the purchaser, claiming to have acquired Landis's equity in the land under his contract, tendered the purchase-money due on his article, and brought this ejectment. He was too late in moving; the judgment in ejectment and execution had put an end to his equity. But it is claimed that there was fraud in obtaining the judgment; that Landis suggested to the plaintiff to proceed against him with some expectation of a favor to his father and mother, and that he did proceed, knowing that there were judgments against him. But what of this? He had a right to repossess himself of the land for the condition broken in the judgment. He did nothing more.

It is not alleged he got judgment for money not due, nor that he issued execution before he had a right to do so. The fact that Landis told him of his condition, and that he acted on that hint, was all right. He was not bound to give the creditors notice, nor to wait to see whether or not they would take any steps to possess themselves of Landis's equity. They should have taken notice of his proceedings. There is no fraud where there is nothing wrong, and the learned judge

very properly directed a verdict for the defendant on the evidence.

Judgment affirmed.

THE PRINCIPAL CASE WAS FOLLOWED in *Maxon's Appeal*, 75 Pa. St. 187, on a somewhat similar state of facts.

DARK v. JOHNSTON.

[55 PENNSYLVANIA STATE, 164.]

AGREEMENT TO CONVEY LAND IF VENDEE SHOULD FIND OIL UPON IT IS TO BE CONSTRUED as an agreement to convey the land if oil should be found within a reasonable time.

OIL, LIKE WATER, IS NOT SUBJECT OF PROPERTY, except while in actual occupancy.

GRANT OF OIL WHICH MAY BE FOUND IN TRACT OF LAND IS NOT GRANT OF CORPOREAL HEREDITAMENT, for which ejectment will lie.

LICENSE MERELY, AND NOT PRESENT ESTATE, CORPOREAL OR INCORPOREAL, IS ACQUIRED by one to whom the owner of lands gave the right to sink wells thereon, agreeing to convey to him a portion thereof, if oil was found in it, and giving him an exclusive right to sink wells on the other portion for a certain sum for each ten years for every well from which he might continuously pump oil, and further agreeing that if he should fail to find oil, he might remove his buildings and machinery, and if oil were found, that the right to pump oil from the well should continue as the rent was paid.

IT IS ESSENTIAL TO EASEMENT that there should be both a dominant and a servient tenement.

PAROL LICENSE, IT SEEMS, IS REVOCABLE AT PLEASURE OF LICENSER, before the licensee has expended labor or money on the faith of it, and it is none the less revocable because a consideration has been paid for it; but it is not so clear that a license given by deed is revocable at the pleasure of the grantor.

LICENSE TO EXPLORE FOR OIL IS NOT REVOCABLE AT PLEASURE OF LICENSER, when it has not only been granted by deed, but the licensee has taken possession of the land and made large expenditures thereon, and with the understanding that if oil was discovered he would be entitled to a conveyance of a certain portion of the land, and to a lease of wells on the other portion.

LICENSE IS PERSONAL PRIVILEGE, AND IS NOT ASSIGNABLE. An assignment by a licensee determines the right.

EJECTMENT by Johnston and others against Dark and others. On November 26, 1859, Samuel McGuire, being the owner in fee of the land in controversy, which consisted of about 250 acres on the Allegheny River, and an island in the river of about nine acres, entered into an agreement with Samuel Baird, which, after reciting these facts, and that McGuire was

desirous of having the land explored for mineral oil, proceeded as follows: "1. Said Baird, as full consideration for the right to sink one or more wells or pits on the island, and four trial wells or pits on the farm, pays to said McGuire one hundred dollars before commencing work; and should said Baird find oil on said island, then said McGuire agrees to sell to said Baird the above described island for the sum of five hundred dollars; the one hundred paid on commencing work to be part of said sum; the remaining four hundred to be paid on McGuire's giving him a warranty deed for said island in fee. 2. Said McGuire covenants and agrees with said Baird to grant him an exclusive right to sink wells and pits for obtaining mineral oil over the rest of said estate, on the following terms and conditions, viz.: One hundred dollars for each and every period of ten years (ten dollars per year), for each and every well or pit that said Baird may continuously pump oil from, the continuous pumping of said oil to be the evidence that such wells or pits are used. The rent for each and every well shall be paid yearly. It is understood and agreed, on the part of said Baird, that he will not, in boring or sinking such wells or pits, or in erecting the necessary buildings and apparatus to obtain and refine or prepare for market said oil, injure any part of said farm valuable as pasture or tillable; and that any fences interfered with shall be restored into good condition. It is further understood and agreed between the parties to this instrument, that in case the said Baird shall fail to find rock oil on either the island or farm aforesaid, then he shall be at full liberty to remove any buildings or machinery he may have put up, and the one hundred dollars paid to McGuire shall be in full of every demand. And further, should oil be found, then the right to pump oil from the wells shall continue as the said rent is paid, as before mentioned. For and in consideration of the above premises, we hereby bind ourselves and our legal representatives for and to the full performance of the agreement in every part." On April 2, 1861, McGuire conveyed the land, and under this conveyance the defendants claim; and on June 29, 1864, Baird conveyed his interest to the plaintiffs. The plaintiffs proved that Baird went into possession of the land, and expended twenty or thirty thousand dollars in boring, buildings, etc. It also appeared in evidence that Baird left the land in 1861. The jury found for the plaintiffs. The defendants' fourth assignment of error, which is the only one considered by the

court, was that the judge erred in charging the jury that "with the lease, and the possession under it, and nothing else intervening to prevent it, we charge that the plaintiffs are entitled to recover."

S. Dickson, and Brown and McKelvy, for the plaintiffs in error.

T. McConnell, R. Brown, and Wetmore and Clark, for the defendants in error.

By Court, STRONG, J. The agreement upon which the plaintiffs below rest their right to recover in ejectment is singularly obscure. The avowed motive that induced it was a desire of the owner of the land that an exploration might be made to ascertain whether it contained mineral oil. But what rights it was intended to give to Samuel Baird, the explorer, it is difficult to determine from the language used by the parties. And the difficulty is increased by the fact that the stipulations respecting the island and those respecting the farm are diverse, and yet they are mingled together. So far as it relates to the conveyance of any interest in the lands, the contract is executory. No doubt it amounts to an engagement to sell the island on a certain contingency, but there is no absolute covenant to sell. McGuire undertook to make a conveyance of the island if Baird should find oil upon it. To allow to the agreement a reasonable construction, it must, of course be held that the discovery of oil must be made within a reasonable time. But what interest, if any, did McGuire agree to give in the body of the farm? The plaintiff insists that the agreement amounts to a sale of the oil itself; and that the oil, being a part of the land, is a corporeal hereditament, to recover possession of which ejectment will lie. But if it be conceded that by the contract there was a grant of the oil, it by no means follows from that alone that ejectment is maintainable. Oil is a fluid like water; it is not the subject of property except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests: *Co. Lit. 4., v.* It would confound all legal notions were it held that an action can be maintained for the recovery specifically of the possession of a subterranean spring or stream of water, no matter whether the waters are mineral or not. There is a manifest difference between a grant of all the coal or ore within a tract of land, or

even the grant of an exclusive right to dig, take, and carry away all the coal in the tract (which we held in *Caldwell v. Fulton*, 31 Pa. St. 478 [72 Am. Dec. 760], to be a grant of a corporeal interest), and a grant of the waters in or on the tract. The nature of the subject has much to do with the rights that are given over it, and to us it appears that a right to take all the oil that may be found in a tract of land cannot be a corporeal right. The contract in this case is in some particulars not unlike that under consideration in *Clement v. Youngman*, 40 Id. 341. Like that, it is the grant of an exclusive right, but no present consideration is agreed to be paid for the oil. It contains no covenants of the grantee either to search for the oil or to become a lessee of wells on the main farm; and what is exceedingly important, it provides for a future conveyance of the island and assurance of rights on the mainland, in the event that oil should be discovered. This provision is very clearly indicative of an intention that no present estate should pass, either corporeal or incorporeal. If the agreement referred to in *Clement v. Youngman*, *supra*, was correctly ruled to convey no corporeal hereditament such as is essential to the maintenance of an ejectment, much more must the contract here be held to be no grant of a corporeal interest in any portion of the farm. There is also no distinct assertion that Baird should have all the oil. At most, his rights are made to extend only to so much as he might find. McGuire does indeed covenant to grant an exclusive right to sink wells for obtaining oil, but even after the grant shall be made, it is only for such wells as he shall continuously pump oil from that the covenantee is to pay rent. The only clause which expressly grants any right to take the oil is the last, and that is, "should oil be found, the right to pump oil from the wells shall continue" as the rent is paid. This surely is not a grant of all the oil. Moreover, Baird is expressly authorized to remove his buildings or machinery, in case he fail to find oil. This provision is unnecessary if a corporeal right was granted. And the removal of buildings, etc., determine all rights under the contract. In such a contingency the one hundred dollars paid are to be in full of every demand. These stipulations point to an intention that nothing more was in contemplation of the parties than a license before the proposed explorations should prove successful, and we think a license is all that Baird acquired. He obtained not even an easement on the land, for it is essential

to an easement that there should be both a dominant and a servient tenement. But the right or privilege assured by this contract was not for any other tract of land, but solely for Baird himself.

Regarding, then, the agreement, not as a conveyance of corporeal estate, but as a license, we proceed to the consideration of its effect. Generally a parol license is revocable at the pleasure of the licensor, and it is none the less revocable because a consideration has been paid for it: *Wood v. Leadbitter*, 13 Mees. & W. 838. It cannot be doubted, therefore, that McGuire might have revoked the license in this case had it been given by parol at any time before Baird had expended labor or money on the faith of it, in prosecuting the explorations. By so doing he might have subjected himself to a liability to respond in damages, but his right to withdraw the permission given would have been inseparable from the nature of the arrangement. Here, however, the license was not parol; it was given by deed. It is not so clear that a license given by deed is revocable at the pleasure of the grantor. See the *Law of Mines, Minerals, and Quarries*, by Arundel Rogers, a late English elementary treatise, page 313. Without pausing to inquire how this may be, how stands the case when a license has not only been granted by deed, but acted upon, and when the licensee, on the faith of it, has made large expenditures? It must be admitted that the license to Baird authorized him to go upon the land, to bore or sink wells and to erect the machinery and buildings necessary for obtaining oil, or at least for ascertaining whether it existed on the land. The privilege included a right to occupy so much of the surface as was required to enable him to enjoy the main thing granted. These privileges, though not all expressly given, are plainly implied; they would be, were no reference made to them. They are, however, spoken of in such a manner as to leave no doubt that it was intended they should go with the right to sink wells. And the evidence given at the trial shows that in the enjoyment of his license Baird did occupy portions of the land, that he expended a large sum of money in sinking wells, and the verdict of the jury establishes that there has been no abandonment.

It has been held in this state that even a parol license executed may become an easement upon the land, and that when acts have been done by one party in reliance upon a license granted to another, the latter will be equitably estopped

from revoking it to the injury of the former: *Le Fevre v. Le Fevre*, 4 Serg. & R. 241 [8 Am. Dec. 696]; *Rerick v. Kern*, 14 Id. 267 [16 Am. Dec. 497]; *Lacy v. Arnett*, 33 Pa. St. 169. These are cases, it is true, where the license was not personal, but where a servitude had been imposed for the benefit of another tenement. In them an easement was allowed in favor of the dominant tenement, appurtenant to it, and passing with it to a grantee of the license, as held in *McKillip v. McIlhenny*, 2 Watts, 466. The same reasons which were controlling in these decisions appear to us to be applicable to the present case. Admitting, as we must, that we are not to confound the contingent covenant to sell the island, and to accept Baird as a tenant of wells on the mainland, with the antecedent rights given to explore, we have still the facts that under the license to explore he was in possession of certain portions of the land, that such possession was authorized, that in taking it and continuing it large expenditures had been made, and that neither the occupancy itself nor the right to maintain it has ever been abandoned. Add to this the fact that if oil should be discovered as a result of his search, Baird was assured that he would be entitled to a conveyance of the island and a lease of wells on the mainland, and it would seem grossly unjust in McGuire to make all his expenditures fruitless to him, and by revoking the license deprive him of the right the expectation of which induced his expenditure. If in *Le Fevre v. Le Fevre*, *supra*, there was enough to raise an estoppel and prevent the licenser from denying to the licensee the fruit of his expenditure, there surely is in this. Taking the occupancy of so much land as was necessary for the allowed explorations as was authorized, it was authorized for a consideration, and so was the continuance of the occupation. Call this what we may,—an easement, which is an incorporeal right, or a temporary right to possession, defeasible, and ended when it shall be ascertained that the land does not contain oil,—it was not for Mr. McGuire to take it away. Neither his conveyance of the land nor a re-entry by himself could deprive Baird of the rights obtained by him in virtue of the license and the action under it.

If, therefore, the case stood upon this ground alone, we should be of opinion that the plaintiffs below were entitled to recover the possession of so much of the island and farm as the licensee had taken the occupancy of for the purpose of sinking wells and ascertaining whether oil is to be found. Thus far the disseisin of McGuire or his grantees

would be regarded unlawful, and we should feel ourselves justified in sustaining an ejectment to restore a possession wrongfully taken away.

But this ejectment was brought by the grantees of Baird, not by himself. We are, therefore, brought to a consideration of the effect of his grant. Looking to the contract, it is plain the license was a personal privilege. It was given to Samuel Baird, and not to his assigns. And it was a privilege to be enjoyed exclusively on the land of McGuire. It was not for the benefit of any other tenement. It was not appurtenant to any other lands, but it belonged exclusively to the person of the grantee. This is affirmable, not only of the right to explore, but of the right to occupy lands for the purpose of exploration. The latter is only an incident of the former. It is but adjutory of the former. When the right to search for oil is gone, the right to occupy land for such a search is gone with it. That a license is a personal privilege, and not assignable, is a well-settled principle. It is induced almost always by confidence in the character of the licensee. A man may well accord a privilege upon his lands to one person which he would refuse to all others. Hence it is held that a personal license is not assignable, and that an assignment by a licensee determines his right. Though a licensor may be estopped from recalling the privilege granted, the licensee may destroy it. He may abandon or release. He cannot substitute another to his right. The cases are numerous in which it has been held that his assignment puts an end to the license: *King v. Hewton*, Bridg. 115; *Hull v. Babcock*, 4 Johns. 418; *Prince v. Case*, 10 Conn. 375 [27 Am. Dec. 675]; *Emerson v. Fisk*, 6 Me. 200 [19 Am. Dec. 206]. It is true that in *Muskett v. Hill*, 5 Bing. N. C. 694, it was ruled that a license to search for and raise metals, and also to carry them away and convert them to the licensee's own use, passes an interest capable of being assigned. But in that case the license was by indenture, it was given to the licensees, their executors, administrators, and assigns, and the indenture contained an express provision that the license and authority should be assignable by deed. The case, therefore, is not in conflict with the rule that a personal license is not assignable, in which respect it differs from a grant which carries an interest. Whatever, therefore, might have been Baird's rights had he retained the privilege given to him by the agreement, his grantees cannot recover in ejectment.

This view of the case dispenses with the necessity of considering any other than the fourth assignment of error.

The judgment is reversed.

WATER IS NOT SUBJECT OF PROPERTY EXCEPT WHILE IN ACTUAL OCCUPANCY: See *Stein v. Burden*, 65 Am. Dec. 394, and note; *Kidd v. Laird*, 76 Id. 472; *Davis v. Getchell*, 79 Id. 636; *Rhodes v. Whitehead*, 84 Id. 631.

GRANT OF MINERALS OR RIGHT TO DIG MINERALS, WHETHER GRANT OF CORPOREAL INTEREST: See *Gloninger v. Franklin Coal Co.*, ante, p. 720, and note 722.

LICENSE, REVOCABILITY OF: See *Hazelton v. Putnam*, 54 Am. Dec. 166, and note digesting prior cases in this series; *Bush v. Sullivan*, 54 Id. 506; *Riddle v. Brown*, 56 Id. 202; *Foster v. Browning*, 67 Id. 505; *Wynn v. Garland*, 68 Id. 190; *Fuhr v. Dean*, 69 Id. 484; *Rhodes v. Otis*, 73 Id. 439; *Wick-ersham v. Orr*, 74 Id. 348; *Giles v. Simonds*, 77 Id. 373; *Burton v. Scherps*, 79 Id. 717; *Snowden v. Wilas*, 81 Id. 370; *Beatty v. Gregory*, 85 Id. 546; *Clute v. Carr*, 91 Id. 442; *Long v. Buchanan*, 92 Id. 653; and see, particularly as to the revocability of licenses to mine, *Bush v. Sullivan*, *Riddle v. Brown*, *Beatty v. Gregory*, supra.

LICENSE IS PERSONAL PRIVILEGE, AND IS NOT ASSIGNABLE: Note to *Ricker v. Kelly*, 10 Am. Dec. 41; *Emerson v. Fisk*, 19 Id. 206; *Prince v. Case*, 27 Id. 675, 680; *Cowles v. Kidder*, 57 Id. 287.

THE PRINCIPAL CASE IS CITED in *Karns v. Tanner*, 66 Pa. St. 308, in holding that where one granted to another the right of boring for oil and mining on a certain tract of land, with a right of way over it, and the privilege of erecting the necessary and convenient buildings and machinery, ejectment may be sustained by the holder of the right to restore a possession unlawfully taken away; and in *Meek v. Breckenridge*, 29 Ohio St. 650, to the point that an estoppel to deny the existence of an easement, growing out of an executed license, is as effectual to confer the right to the enjoyment of the easement as if the right had been made the subject of an express grant, and upon the conveyance of the estate to which the use is attached, the easement goes to the grantee as fully and effectually as if the grantor owned the fee of the adjoining estate.

HERDIO v. YOUNG.

[55 PENNSYLVANIA STATE, 176.]

REPLEVIN LIES IN PENNSYLVANIA WHEREVER ONE CLAIMS GOODS IN POSSESSION OF ANOTHER, without regard to the manner in which the possession was obtained.

REPLEVIN IS FOUNDED UPON UNLAWFUL TAKING, which fixes the character of the recovery, and enters directly into the question of damages.

REPLEVIN SOUNDS IN DAMAGES AS TRESPASS; and, it seems, exemplary damages may be given where there has been outrage in the taking, or vexation and oppression in the detention.

VERDICT FOR PLAINTIFF IN REPLEVIN TRANSFERS TITLE TO DEFENDANT, it seems, on a plea of property and retention by the defendant.

MEASURE OF DAMAGES IN REPLEVIN MAY BE LESS THAN VALUE OF PROPERTY in a proper case, as it may go beyond the value to compensate for injustice and outrage.

MEASURE OF DAMAGES IN REPLEVIN FOR LOGS CUT FROM ADJOINING TRACT THROUGH BONA FIDE MISTAKE as to the boundary line, and transported to a boom, is the value of the logs at the boom, less the cost of cutting, hauling, and driving them there.

REPLEVIN by Herdic & Co. against Young & Co. for logs cut by the latter upon the land of the former. The facts are stated in the opinion.

G. White and J. W. Comly, for the plaintiffs in error.

W. H. Armstrong and H. C. Parsons, for the defendants in error.

By Court, AGNEW, J. This writ of error taken by the plaintiffs below raises a single question,—as to the true measure of damages. The defendants being engaged in cutting timber on their own tract, but mistaking their true boundary, cut saw-logs on the adjoining tract of the plaintiffs. The act seems not to have been willful or wanton, but to have been done in a *bona fide* belief of title to the *locus in quo*. The logs were driven to the boom by the defendants, and there replevied by the plaintiffs. The plaintiffs offered proof of the value of the logs at the boom, which was rejected by the court, and the jury were instructed that the measure of damages was the value of the timber on the stump where the trees were cut. The question is perhaps a new one in this state, and not well settled elsewhere; but it seems to me there are well-known principles to lead us to a proper conclusion. Replevin lies in this state wherever one man claims goods in the possession of another, without regard to the manner in which the possession was obtained: *Keite v. Boyd*, 16 Serg. & R. 301; *Weaver v. Lawrence*, 1 Dall. 157; *Shearick v. Huber*, 6 Binn. 3; *Stoughton v. Rappalo*, 3 Serg. & R. 562; *Moser v. Libenguth*, 2 Rawle, 428. But in its origin, the action was founded upon an unlawful taking of the property: Wilkeson on Replevin, 6; Law Library, 1; 3 Bla. Com. 145. It was confined, according to Sir William Blackstone, to the single case of taking goods by distress, but the earlier and later English authorities show that this is an error: 3 Chitty's Blackstone, 145, in notes; 1 Chitty's General Practice, p. 811, c. 10, sec. 2. The unlawful taking gives character, therefore, to the recovery, and enters directly into the question of damages. Hence it is said that

in replevin a verdict for the plaintiff gives damages precisely as in trespass; and if the verdict be for the defendant, damages are given as in a verdict for a plaintiff in trespass: Vol. 1, pt. 2, Troubat and Haly's Penn. Practice, by Fish, ed. 1867, p. 585, citing Archbold's Practice, 193; *McDonald v. Scaife*, 11 Pa. St. 385 [51 Am. Dec. 556]. Rogers, J., in the last case, cites the language of Chief Justice Kent in *Hopkins v. Hopkins*, 10 Johns 372, that the action of replevin is grounded on a tortious taking, and it sounds in damages like an action of trespass. The analogy has been carried so far in this state that the settled doctrine in replevin is, that exemplary damages may be given where there has been outrage in the taking, or vexation and oppression in the detention: *McDonald v. Scaife*, *supra*; *McCabe v. Morehead*, 1 Watts & S. 513. In the last case, Sergeant, J., citing *Brizbee v. Meybee*, 21 Wend. 144, says where a writ of replevin is sued out fraudulently, and without color of right, the jury would be warranted in giving even exemplary damages, in the same manner they might do for a wanton and malicious trespass. So the effect of a verdict for the plaintiff in replevin for damages on a plea of property and retention by the defendant is to transfer the title in the goods; so much so, that a clause in the property bond to return them to the plaintiff is void: *Moore v. Shenk*, 3 Pa. St. 13 [45 Am. Dec. 618].

The value of the property being in replevin, as in trespass, the common measure of damages was not the only guide; the moment we are at liberty to resort to the circumstances attending the taking to qualify the general rule, it can make no difference whether the purpose be to moderate or to enlarge the damages. If we go beyond the value to compensate for injustice and outrage, the same principle requires us in a proper case to restrict a value derived from the labor and expense of the defendant to that less sum which the state of the property at the time of taking and the true demands of justice require. As remarked by Lowrie, C. J., in *Morrison v. Robinson*, 31 Pa. St. 458, our natural sense of justice furnishes the ground and the measure of compensation for injuries done by one man to the property of another, and demands an adequate remedy to obtain it.

In trespass for mesne profits, compensation was therefore held to be the measure of damages, and the defendant will be allowed for the value of permanent improvements erected by one whose title he had bought. On the same point, see *Hus-*

ton v. Wickersham, 2 Watts & S. 314; *Jones v. Brownfield*, 2 Pa. St. 59, *per* Grier, P. J. Such compensation merely would have been the standard in this case had ejectment or trespass *quare clausum fregit* been brought instead of replevin. The value of the timber on the ground would have measured the mesne profits. Upon principle and analogy, it is unjust to give to the plaintiffs the advantage of the labor and expense of the defendant's cutting and hauling the logs and driving them to the boom. Yet if we confine our view to the condition of the property at the time of replevy, instead of going back to the time of the taking, this would be the mere effect of a change in the form of action, and not of an alteration of the circumstances. It is well known that the expense of cutting, hauling, and rafting to a distant market far exceeds the cost of the timber on the ground, or timber-leave, as it is often called. If we add to this, as might be the case, the expense of sawing the logs into boards, and a replevin for the boards, the injustice is gross in a case of inadvertent trespass.

The primary purpose of replevin is to recover the property *in specie*, not its value.

A change in its form will not prevent this so long as its identity can be established. *Snyder v. Vaux*, 2 Rawle, 425 [21 Am. Dec. 466], decides that the converting of timber trees cut by the defendant into posts and rails is not such an alteration as to prevent a recovery in replevin. A willful trespasser, says Justice Smith, cannot acquire title to property merely by changing it from one article into another; as by working trees cut down into shingles or into cord-wood or rails, so long as the identity of the original materials can be shown. It is in the power of the defendant in replevin to relinquish that proportion of its value which his labor or money has added to it by suffering the sheriff to return it to the owner.

But this result depends on himself. If he claim the additional value, it is always his right to retain the property by giving a property bond; and the effect of a verdict for damages in favor of the plaintiff is to transfer the title to the defendant. If, therefore, he denies that his trespass was willful or wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass, or one done under a *bona fide* but mistaken belief of right, this would generally be the value of the

logs at the boom (the place here of replevy), less the cost of cutting, hauling, and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable, and does justice to both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, or other adventitious causes.

These principles are recognized fully by Mr. Sedgwick in his valuable treatise on damages, ed. 1852: "That the intent of the defendant is material in regard to damages, has always been recognized in our law": p. 455. "The question of intention is urged only in mitigation or aggravation of damages": Id. 455, 528. On page 495, he says: "If the property had been altered and increased in value, the rule would again depend on the character of the conversion. If that were willful, then the value of the articles so increased would be the rule. But this should never be where the act was *bona fide*; and in such case, the true rule would be to allow the defendant for whatever value his labor had actually conferred upon the property": See also Id. 501.

The court below erred, therefore, in rejecting the plaintiffs' evidence of the value of the logs in the boom; the evidence being received, the defendants would be left to rebut it, if their trespass was unintentional, by showing how much it cost to cut and haul the logs and drive them to the boom.

The judgment is reversed, and a *venire facias de novo* awarded.

THE PRINCIPAL CASE as it first came before the court is reported in *Young v. Herdic*, 55 Pa. St. 172. In *Young v. Lloyd*, 65 Id. 199, it appeared that Lloyd had sold Young & Co. the standing timber from which the logs in question, in the principal case, were cut, and had pointed out the boundary lines of his lot. In an action by him to recover the price of the logs, it was held that Young & Co. could set off only the costs in the replevin suit.

REPLEVIN, WHETHER LIES FOR MERE WRONGFUL DETENTION: See *Badger v. Plunney*, 8 Am. Dec. 105; *Marshall v. Davis*, 19 Id. 463; *Watson v. Watson*, 23 Id. 324; *Crocker v. Mann*, 26 Id. 684; *Root v. French*, 28 Id. 482; *Shaddon v. Knott*, 58 Id. 63; *Dearmon v. Blackburn*, 60 Id. 160; note to *Hickey v. Hinsdale*, 77 Id. 453; *Harwood v. Smethurst*, 80 Id. 207; *Anderson v. Hapler*, 85 Id. 318, 320; *Oleson v. Merrill*, 91 Id. 428; *Eveleth v. Blossom*, 92 Id. 555.

MEASURE OF DAMAGES IN TRESPASS DE BONIS ASPORTATIS IS ORDINARILY VALUE OF PROPERTY: *Woolley v. Carter*, 11 Am. Dec. 521; *Benjamin v. Benjamin*, 39 Id. 384; *Rose v. Story*, 44 Id. 121; *Harker v. Dement*, 52 Id. 670; *Daniels v. Brown*, 69 Id. 505; *Freidenheit v. Edmundson*, 88 Id. 141.

MEASURE OF DAMAGES IN REPLEVIN IS ORDINARILY VALUE OF PROPERTY: *Moore v. Shenk*, 45 Am. Dec. 618; *McDonald v. Scaife*, 51 Id. 556; *Linn v. Wright*, 70 Id. 282; *Bennett v. Hood*, 79 Id. 705; *Booth v. Ahleman*, 88 Id. 730; compare *Jennings v. Johnson*, 49 Id. 451; *Sutcliffe v. Dohrman*, 51 Id. 450.

EXEMPLARY DAMAGES ARE RECOVERABLE IN TRESPASS DE BONIS ASPORTATIS, if accompanied by circumstances of aggravation: *Hite v. Long*, 18 Am. Dec. 719; note to *Merrills v. Tariff Mfg. Co.*, 27 Id. 688; note to *Austin v. Wilson*, 50 Id. 766; *Parker v. Mise*, 62 Id. 776, 777; *Freidenheit v. Edmundson*, 88 Id. 141.

EXEMPLARY DAMAGES ARE RECOVERABLE IN REPLEVIN, if there are circumstances of aggravation or outrage attending the taking or detention: Note to *Merrills v. Tariff Mfg. Co.*, 27 Am. Dec. 688; *Moore v. Shenk*, 45 Id. 618; *McDonald v. Scaife*, 51 Id. 556, and note. The principal case is cited in *Craig v. Kline*, 65 Pa. St. 415, to the point that exemplary damages may be given in replevin where there has been outrage in the taking, or vexation and oppression in the detention; and on the other hand, an innocent mistake in the taking or detention may reduce the damages.

JUDGMENT FOR PLAINTIFF IN REPLEVIN, TRESPASS, OR TROVER, WHETHER TRANSFERS TITLE TO DEFENDANT: See *Acheson v. Miller*, 59 Am. Dec. 663, and note collecting prior cases; *Moore v. Shenk*, 45 Id. 618.

THE PRINCIPAL CASE IS CITED in *Ege v. Kille*, 84 Pa. St. 340, to the point that persons who act in good faith in the working of mines and in the removal of the ore should be chargeable for it only with its value in place; in *Coleman's Appeal*, 62 Id. 278, to the point that the case of a tenant in common of ore banks, who has no other means of obtaining his own share than by taking at the same time the shares of his co-tenants, is entitled to a still more favorable regard than that of a trespasser by mistake or ignorance, and the value of the ore in place is, therefore, the just basis of account; in *Railroad Co. v. Hutchins*, 37 Ohio St. 295, to the point that a person deprived of his property by an unintentionally wrongful act, who seeks redress in damages, is not entitled to receive from the wrong-doer an increase of damages by reason of accessions to the value of the property from the labor or skill of such wrong-doer; and to the same effect is *Railroad Co. v. Hutchins*, 32 Id. 580; but compare *Barton Coal Co. v. Cox*, 39 Md. 24, commenting upon the principal case; and see the principal case also explained in *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 239, in that there is a plain distinction in measuring damages between property rightfully acquired and that taken wrongfully.

WEST CHESTER AND PHILADELPHIA RAILROAD COMPANY v. MILES.

[55 PENNSYLVANIA STATE, 209.]

COMMON CARRIER MAY MAKE REASONABLE REGULATIONS as to separation of passengers.

COMMON CARRIER'S RIGHT TO SEPARATE PASSENGERS IS FOUNDED upon his private property in the means of conveyance and upon the public interest.

COMMON CARRIER'S REGULATION AS TO SEATING PASSENGERS so as to preserve order and decorum is reasonable and proper, both as regards his right of private property and the public interest.

COMMON CARRIER'S REGULATION AS TO SEPARATION OF BLACK FROM WHITE PASSENGERS is sound and reasonable.

TRESPASS by Mary E. Miles against the West Chester and Philadelphia Railroad Company. The plaintiff, a colored woman, got into a car of the defendant at Philadelphia to go to Oxford, and took a seat at or near the middle of the car. A rule of the defendant required the conductor to make colored persons sit at one end of the car. The conductor accordingly got a seat for the plaintiff at the end of the car, and asked the plaintiff to take it, but she positively and persistently refused to comply with the request, and after being told of the rule, and that she must leave the car if she did not obey, the conductor finally removed her. The defendant requested the court to charge that if the jury found that the seat which the plaintiff was directed to take was in all respects a comfortable, safe, and convenient seat, not inferior in any respect to the one she was directed to leave, she could not recover, but the court charged that a regulation which prohibited a well-behaved colored person from taking a vacant seat in a car, simply because she was colored, was not a regulation which the law allows, and denied the defendant's request, and added that the defendant could not compel the plaintiff to change her seat simply on account of her color. The plaintiff had a verdict, whereupon the defendant sued out a writ of error.

E. S. Miller, for the plaintiff in error.

G. H. Earle and R. P. White, for the defendant in error.

By Court, AGNEW, J. It is admitted no one can be excluded from carriage by a public carrier on account of color, religious belief, political relations, or prejudice. But the defendants in their point asked the court to say that if the jury find that the seat which the plaintiff was directed to take was in all respects a comfortable, safe, and convenient seat, not inferior in any of these respects to the one she was directed to leave, she could not recover. The case, therefore, involves no assertion of the inferiority of the negro to the white passenger; but conceding his right to be carried on the same footing with the white man, it assumes it to be not unreasonable to assign places in the cars to passengers of each color. The simple question is, whether a public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers by any other well-defined

characteristic than that of sex. The ladies' car is known upon every well-regulated railroad, implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none.

This question must be decided upon reasonable grounds. If there be no clear and reasonable difference to base it upon, separation cannot be justified by mere prejudice. Nor is merit a test. The negro may be proud of his service in the field as a defender of his country. But it was not thought indefensible to separate even white soldiers from other passengers. There was a clear and well-founded difference between the civil and military character, and the separation of soldiers from citizens implied no want of equality, but a sound regulation of the right of transit.

The right of the carrier to separate his passengers is founded upon two grounds: his right of private property in the means of conveyance, and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest as well as the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interests of those he carries. If the ground of regulation be reasonable, courts of justice cannot interfere with his right of property. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of passengers. An analogy and an illustration are found in the case of an innkeeper, who, if he have room, is bound to entertain proper guests, and so a carrier is bound to receive passengers. But a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will, or refuse to obey the reasonable orders of the captain of a vessel. But on the other hand, who would maintain that it is a reasonable regulation, either of an inn or a vessel, to compel the passengers, black and white, to room and bed together? If a right of private property confers no right of control, who shall decide a contest between passengers for

seats or berths? Courts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfill their duty to the public, but not a whit beyond.

The public also has an interest in the proper regulation of public conveyances for the preservation of the public peace. A railroad company has the right and is bound to make reasonable regulations to preserve order in their cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may on extraordinary occasions stop his train and eject the unruly and tumultuous. But he has not the authority of a peace officer to arrest and detain offenders. He cannot interfere in the quarrels of others at will merely. In order to preserve and enforce his authority as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro take his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards the breach of the peace it may have caused. These views are sustained by high authority. Judge Story, in his *Law of Bailments*, stating the duty of passengers "to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers as well as for their own proper interests," says "the importance of the doctrine is felt more strikingly in cases of steamboats and railroad cars": Sec. 581 a; see also sec. 476 a; Angell on Carriers, sec. 528; 1 American Railway Cases, 393, 394.

The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this state, resulting from nature, law, and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black

and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which he always imparts to his creatures when he intends that they shall not overstep the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman,—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind. but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.

Nor can we disregard the laws and customs of the state. Indeed, these must be our guide, leaving it to the legislature to correct the errors of the law, or its departure from that justice which should be its foundation. It is unnecessary to recur to the original condition of negroes as slaves in Pennsylvania, or to trace the legislation of the province distinguishing them from freemen. Nor need we, for the purpose

of defining the *status* of the negro, refer to that great law of emancipation in 1780, whose preamble, the most beautiful, just, and expressive ever prefixed to a human statute, only professed to extend to the black race, "a portion" of our own freedom. We have a later and an authoritative guide, the solemn decision of this court in 1837, in the case of *Hobbs v. Fogg*, 6 Watts, 553. The opinion came from the pen of the late Chief Justice Gibson, and bears the imprint of his remarkable intellect. It is there shown from the laws, constitutions, and customs of the state, and from a former decision of the high court of errors and appeals, that the *status* of the negro never fell within the term "freeman" in the several constitutions; and that the emancipation act of 1780 did not elevate him to the citizenship of the state. And in 1838 the people of this commonwealth, by an express amendment of their constitution, drew the line directly between the white citizens and the black inhabitants of the state. It is clear, therefore, that under the constitution and laws the white and black races stand in a separate relation to each other. We find the same difference in the institutions and customs of the state. Never has there been an intermixture of the two races, socially, religiously, civilly, or politically. By uninterrupted usage, the blacks live apart, visit and entertain among themselves, occupy separate places of public worship and amusement, and fill no civil or political stations, not even sitting to decide their own causes. In fact, there is not an institution of the state in which they have mingled indiscriminately with the whites. Even the common-school law provides for separate schools when their numbers are adequate. In the military service, also, they were not intermixed with the white soldiers, but were separated into companies and regiments of color, and this not by way of disparagement, but from motives of wisdom and prudence, to avoid the antagonisms of variant and immiscible races. Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away. We cannot say there was no difference in fact, when the law and the voice of the people had said there was. The laws of the state are found in its constitution, statutes, institutions, and general customs. It is to these sources judges must resort to discover them. If they abandon these guides, they pronounce their own opinions, not the laws of those whose officers they are. Following these guides, we are compelled to declare that, at the time of the alleged injury, there was

that natural, legal, and customary difference between the white and black races in this state which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights both of carriers and passengers. The defendants were therefore entitled to an affirmative answer to the point recited at the beginning of this opinion.

It only remains to add that this cause arose before the passage of the act of 22d of March, 1867, declaring it an offense for railroad companies to make any distinction between passengers on account of race or color; and our decision pronounces the law only as it stood when the case arose, leaving the act to operate upon such cases as shall fall within its provisions. Indeed, the act itself is an indication of the legislative understanding of the law as it stood before the passage of the act.

Judgment reversed, and a *venire facias de novo* awarded.

READ, J., dissented.

COMMON CARRIER OF PASSENGERS MAY MAKE REASONABLE REGULATIONS: *Commonwealth v. Power*, 41 Am. Dec. 465, and note; *Cheney v. Boston etc. R. R.*, 45 Id. 190, and note; *State v. Overton*, 61 Id. 671; *Day v. Owen*, 72 Id. 62; *Sullivan v. Philadelphia etc. R. R.*, 72 Id. 698; *Johnson v. Concord R. R.*, 88 Id. 199; *Chicago etc. R. R. v. Flagg*, 92 Id. 133; *Illinois etc. R. R. v. Whittemore*, 92 Id. 138. The principal case is cited to this effect in *O'Donnell v. Allegheny Valley R. R.*, 59 Pa. St. 250; *Pennsylvania R. R. v. Langdon*, 92 Id. 27; *Chicago etc. R'y v. Williams*, 55 Ill. 189; S. C., 8 Am. Rep. 644; *Hall v. De Cuir*, 95 U. S. 503; and see *Mount Moriah Cemetery Ass'n v. Commonwealth*, 81 Pa. St. 246.

CLASSIFICATION OF PASSENGERS BY COMMON CARRIERS. — "It is a recognized rule that a carrier cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Classifications and discriminations may be made for the general convenience and security of the passengers, but such distinctions must be on some principle or for some reason which the law recognizes as just and equitable, and founded in sound public policy": Thompson's Carriers of Passengers, 345. The reservation of a car for the accommodation of ladies and their escorts has always been conceded to be a reasonable measure: Id.; note to *Commonwealth v. Power*, 41 Am. Dec. 481, where the question is discussed; but if a classification is to be made upon the basis of color, it must be founded upon something more substantial than mere prejudice: Thompson's Carriers of Passengers, 346; note to *Commonwealth v. Power*, 41 Am. Dec. 482.

UNITED STATES TELEGRAPH COMPANY v. WENGER.

[55 PENNSYLVANIA STATE, 262.]

TELEGRAPH COMPANY IS GUILTY OF GROSS NEGLIGENCE, and is therefore liable to the sender of the message for such damage as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination.

MEASURE OF DAMAGES FOR FAILURE OF TELEGRAPH COMPANY TO TRANSMIT MESSAGE ordering the purchase of certain stocks, which were afterwards bought under another order at advanced prices, is such advance, that being the damage which must reasonably be presumed to have been contemplated by the parties, since the message disclosed the nature of the business to which it related, and its object was to buy stock as soon as received, no other time being named.

DECLARATIONS OF BROKERS AS TO REASON WHY THEY DID NOT BUY STOCK on the receipt of a letter ordering its purchase are not admissible in favor of the principal, in an action by him against a telegraph company to recover damages for the failure to transmit a previous message to the brokers ordering the purchase, the declarations not being *res gestæ* in regard to the contract to send the message.

REFUSAL TO ORDER NONSUIT IS NOT REVIEWABLE in the supreme court.

REFUSAL TO STRIKE OUT EVIDENCE, ADMITTED WITHOUT OBJECTION, IS NOT SUBJECT OF EXCEPTION. The proper mode is to request the court to charge that it be disregarded.

OPINION OF BROKER IS NOT ADMISSIBLE as to the certainty that stock could have been purchased at the quotation prices, at a certain time, in an action against a telegraph company for its failure to transmit a message to brokers, ordering the purchase of certain stocks.

CASE by M. G. Wenger against the United States Telegraph Company. The plaintiff employed one Reed, a broker, of the firm of Reed, McGrann, & Co., at Lancaster, to order fifty shares of North Western Railroad stock and fifty shares of Prairie du Chien stock. Reed testified that on October 10, 1864, he accordingly gave the following message to the agent of the defendant at Lancaster, directed to one O'Brien, of the firm of O'Brien & Co., brokers, at New York, and prepaid the charges thereon: "Buy (50) fifty North Western—Fifty (50) Prairie du Chien, limit forty-five (45)." He also repeated the order by mail. Having received no answer that evening, he went to the telegraph office to make inquiries, and was informed that the message had been sent, but that it was detained at Philadelphia. O'Brien & Co. received the letter before business hours, on October 11th, and made the purchase under the order contained in it October 13th, but at an advance of \$462.50 over what the stock might have been purchased for on October 10th. The witness was allowed to

state, against the objection of the defendant, the reason given by O'Brien & Co. why they did not buy the stock as soon as the letter was received by them; and a letter from O'Brien & Co., from which the witness learned the reason, was also offered and received. The reason was, that as the letter stated a dispatch had been sent, and as O'Brien & Co. had received no dispatch, they concluded the letter referred to some other order, and declined to buy until after the receipt of a telegram on the 13th. The defendant moved for a nonsuit on the ground that there was no evidence against the United States Telegraph Company, but the nonsuit was refused. The defendant also moved to strike out certain evidence, admitted without objection, but the court refused to do so. The defendant offered to prove by a banker and broker that there was no certainty that the stock could have been purchased at the quotation prices on the morning the telegram was received by the defendant for transmission, but the court refused to hear the testimony. The judge charged the jury as to the measure of damages, as appears in the opinion. The plaintiff had a verdict, and the defendant sued out a writ of error.

D. G. Eshelman and G. W. Patterson, for the plaintiff in error.

W. R. Wilson, for the defendant in error.

By Court, THOMPSON, J. The broker of the plaintiff below ordered the purchase of certain stocks in New York for him, by telegraph, on the 10th of October, 1864, and having prepaid the charges, gave the message to the defendants for transmission to his correspondents named therein. The message, it appears, got no further than Philadelphia, although the defendants' line extended to Portland, Maine. No such reason as the law would recognize, indeed no reason at all, was given for the failure to transmit the message to its destination. Thus was there presented a clear case of gross negligence against the company in performing its undertaking, and a consequent liability to the plaintiff for such damage as he had sustained in consequence thereof. The stock ordered was of course not purchased on the day the dispatch was given to the company to be transmitted, as it might have been, for it was not pretended it was not in the market; but three days thereafter it was procured at an aggregate advance of \$462.50. This difference the plaintiff claims is the damage he has sus-

tained and entitled to recover. Undoubtedly, this is the measure of damage in this case. The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was a want of promptitude in transmitting it containing the order. In this respect it differs much from that in *Landberger v. Magnetic Telegraph Co.*, 32 Barb. 550. "Get ten thousand dollars of the Mail Company," the message in that case said, but did not disclose that the money was to be gotten from the Mail Company to save from failure a valuable contract; hence it was held that the damages arising from that cause could not reasonably be presumed to have been in the contemplation of the parties to the contract, or not recoverable to that extent. Here the object of the message was for the purpose of buying stock as soon as received; no other time being named, and it is not possible, consistently with any knowledge of the business of dealing in stocks, to fail to understand that damage might ensue—nay, would be likely to ensue—by delay. The damage from such a source was what would naturally have entered into the minds of the sender and the undertaker to send the message if they thought on the subject at all; and that they did think is true, if the witness was credible, and whose uncontradicted statement is, that he notified the operator that he would look to the company for damages if they failed in transmitting the message. The rule laid down by the learned judge as to the measure of damages was all right enough, and therefore in accordance with settled principles.

But there is one matter in which we think the court erred, although it has scarcely received the attention of a passing notice by the counsel for the defendant in error, and that was the admission in evidence of the declarations of O'Brien & Co., as offered to be proved by Reed, in order to show why they did not buy the stock on the receipt of the letter from the plaintiff's agent, containing a repetition of the telegram. That was received before business hours on the morning of the 11th, but they did not act upon it, and did not buy the stock until after the receipt of a telegram on the 13th. The witness was allowed to state these reasons against the objection of the defendants. Their letter from which the witness learned these reasons was also offered and received. We cannot see upon what grounds this testimony was admissible. O'Brien & Co. were competent witnesses. In fact, their testimony had been taken and used in the case as to other matters, but not on this point; it should

have been taken as to this matter also. Their declarations were not *res gestæ* in regard to the contract to send the message,—they touched a different point, viz., performance. Not being receivable on this ground, it is manifest they were not on any, and in receiving these unsworn statements, the court, in our opinion, erred. We reverse, therefore, although reluctantly, on this ground; for it is altogether probable that sufficient reasons will be shown by these men, when their testimony is taken, to account for their non-action on the receipt of the letter from the plaintiff's broker on the 11th of October, 1864.

There was no error reviewable in this court for refusing to nonsuit the plaintiffs as claimed by the defendant. And if it were reviewable, a better reason than the one assigned for it would have been required. The company's corporate existence was not in issue by the pleadings. Besides, the testimony showed beyond controversy that the company which undertook to transmit the message was the one sued, and was the defendant in the case.

Nor was the refusal to strike out evidence the subject of exception. The evidence being in without exception, the only mode of repairing the damage was to request the court to charge that it be disregarded. On this, as well as on the point preceding, we have several times lately declared the rule to be as now stated.

There was no error in refusing to hear testimony "that there was no certainty that the stock could have been purchased at the quotation prices, on the morning the telegram was received." Had the proposed testimony assumed the position of a fact in this particular case, it would have been evidence. It was but opinion, and did not tend to disprove the prices current sworn to, and was not evidence. There is no error in any portion of the case but that indicated above; but on account of that we are constrained to reverse.

Judgment reversed, and *venire de novo* awarded.

TELEGRAPH COMPANIES, DUTIES AND LIABILITIES: See *Birney v. New York etc. Tel. Co.*, 81 Am. Dec. 607, and note discussing the subject.

DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES: See *Parks v. Alta California Tel. Co.*, 73 Am. Dec. 589; *Birney v. New York etc. Tel. Co.*, 81 Id. 607. The principal case is approved in *Tyler v. Western Union Tel. Co.*, 60 Ill. 439, as to the measure of damages in an action against a telegraph company for its negligence in transmitting a message to sell stock.

THE PRINCIPAL CASE IS CITED in *Borough of Easton v. Neff*, 102 Pa. St. 476, to the effect that a refusal to enter a compulsory nonsuit is not assign-

able for error; and in *Tyler v. Western Union Tel. Co.*, 60 Ill. 434, it is approved on the point that a message to "Sell one hundred Western Union. Answer price," sufficiently disclosed to the operator the nature of the business so as to inform him of the importance of its correct transmission.

HOUSER v. LAMONT.

[55 PENNSYLVANIA STATE, 311.]

STATUTE OF FRAUDS CANNOT BE USED BY PLAINTIFF IN EJECTMENT, so as to convert a mortgage in the form of a deed into an absolute conveyance, where the purchaser of property at an orphans' court sale agreed verbally to sell it to the defendant, and received part of the purchase-money, but took the deed in his own name as security for the balance, which was afterwards advanced to him by the plaintiff, to whom he made a deed of the property as security therefor.

DEED TAKEN AS SECURITY FOR MONEY LOANED IS BUT MORTGAGE, and cannot by any form of words, or other means, be converted into an absolute conveyance.

VENDEE'S TITLE CANNOT BE CONTESTED AS BEING WITHIN STATUTE OF FRAUDS, because the contract of sale was verbal, by one who advanced the unpaid purchase-money to the vendor, taking from him a deed as security therefor.

VERBAL SALE OF LAND MAY BE SUSTAINED BY VENDOR'S OATH in favor of the vendee.

EJECTMENT by William C. Houser against Mary Lamont for a house and lot. It was admitted that Edward Lamont died seised in fee of the property in question. The plaintiff proved a sale of the property as the estate of Edward Lamont, by his administrator, under an order of the orphans' court, to Solomon G. Bowman, a deed to Bowman, and a deed from Bowman to himself. The defendants then called Bowman, who, under exception as to his competency, and the matter to be proved by him, testified as set forth in the opinion of the court. The court charged, among other things not necessary to be noticed, that if the plaintiff took the deed from Bowman as security for money loaned to and paid for Mary Lamont, the deed would be considered as a mortgage; and Miss Lamont having tendered the money due thereon to the plaintiff, and having brought it into court, this would defeat a recovery by the plaintiff. The verdict was for the defendants, and the plaintiff assigned as error the admission of the evidence, and the instruction to the jury, above referred to.

S. Hepburn and W. M. Penrose, for the plaintiff in error.

J. Rittner, L. Todd, W. H. Miller, and H. Newsham, for the defendants in error.

By Court, AGNEW, J. The verdict of the jury under the specific instruction of the learned judge of the common pleas establishes that the deed from Bowman to Houser was a mortgage, and not a sale. The evidence fully sustains the finding that he accepted it as a security for the money he advanced for the benefit of Miss Lamont. The peculiar and governing feature of the case is, that Bowman, who purchased the premises at the orphans' court sale, and had verbally agreed to sell them to Miss Lamont for the same price he paid, did not deny his sale to her, but recognized and made it the foundation of his conveyance to Houser, and came into court and testified to it. Being examined as a witness on part of Miss Lamont, he testified that he had sold the property to her, and she had paid him \$975 in money, and was credited by him with \$74, the surplus of the rents he received over the interest. Wishing to realize his money, he asked a Mr. Boss to advance it for Miss Lamont on the security of the property. But on informing Miss Lamont of his purpose, she preferred that Mr. Houser should take it, as he was her friend and neighbor. Houser interested himself for her, spoke to a Mr. Dunlap to advance the money for her, but finally concluded to do it himself. In the mean time he had dissuaded Boss from advancing it. Bowman testifies that then he conveyed the property to Houser upon the same condition he held it, which was that Houser should hold it until all the money was paid. He states that he had paid \$1,875 for the property, and that the deed was made to Houser on his payment of \$825.27, the balance Miss Lamont then owed him. Thus it appears by the testimony of Bowman himself, the only party who could set up the statute of frauds against Miss Lamont, that he not only conceded her title, but conveyed to Houser on the very basis of her ownership, and receiving from Houser the balance only, which she owed him on her purchase. Bowman did not sell nor did Houser pay for the value of Miss Lamont's interest in the premises. Houser afterwards repeatedly admitted the true relation he sustained to the property, to wit, that of a mere lender of money upon its security; and indeed, did not deny it until bad feeling sprang up, when, on taking advice, he concluded to set up the statute of frauds against her title, and this is now the position taken in the argument.

But Houser does not stand in a position to set up the statute. He is the plaintiff in the ejectment and must stand upon his own title, which is only a mortgage, and the defendant has

tendered and brought into court the money due upon it. He is not an absolute purchaser from Bowman, and can use his ejectment only to enforce payment of the money due to him; but instead of this he seeks to convert his mortgage into an absolute conveyance, by setting up the statute of frauds, which Bowman had waived, and thus to hold the property without having paid the major part of its value. To suffer this would be to permit him to perpetrate a fraud by obtaining the title on the pretense of a loan of a small part of its value from one who conceded Miss Lamont's title and treated with him expressly upon the basis of her ownership. Bowman did not convey Miss Lamont's interest in the property, except as a security for Houser's advance to pay her debt, and it would be a gross fraud for the latter now to hold that interest under a conveyance made for a different purpose. Probably nothing is better settled in this state than this: that a deed taken as a security for the loan of money is but a mortgage, and cannot by any form of words or other means be converted into an absolute conveyance: *Colwell v. Woods*, 3 Watts, 188 [27 Am. Dec. 345]; *Kunkle v. Wolfersberger*, 6 Id. 126; *Holsey v. Trevillo*, 6 Id. 402; *Rankin v. Mortimere*, 7 Id. 372; *Hiestler v. Maderia*, 3 Watts & S. 384; *Todd v. Campbell*, 32 Pa. St. 250; *Kellum v. Smith*, 33 Id. 158. Houser being a mere mortgagee by his arrangement with Bowman, the equity of redemption vested in Bowman for the benefit of Miss Lamont, and he only could contest her title on the ground of the statute of frauds. This he has not done, but he came into court as a witness in her behalf in support of her title by purchase from himself. Here it is that the special feature of the case already noticed comes into play. It is settled equity law that courts of equity will enforce specific performance of a contract within the statute of frauds, where it is confessed in the answer of the defendant: 2 Story's Eq. Jur., sec. 755. The reason, says Judge Story, is, that the statute is designed to guard against fraud and perjury, and in such a case there can be no danger of that sort,—it is not within the mischief intended to be guarded against by the statute. Acting upon this principle, this court held in *Christy v. Brien*, 14 Pa. St. 248, that a parol sale without delivery of possession would be sustained when supported on the trial by the oath of the vendor. "The single question," said Gibson, C. J., "is whether it is taken out of the statute of frauds by the acquiescence of the vendors, who are the plaintiffs' witnesses, promoting a recovery by their

testimony, instead of opposing it even by a wish. They stand in the attitude of respondents in a bill in equity, confessing the contract and refusing to plead the statute. They not only confess it, but they swear to it." In the *Harrisburg Bank v. Tyler*, 3 Watts & S. 373, the same judge held that the declarations of a trustee of an investment being made by him in trust, after his death became evidence of the fact, as the confession of one peculiarly cognizant of it, whose sacrifice by the narration was the equivalent of an oath. Bowman having, therefore, recognized and acted upon the interest of Miss Lamont in the land in the very transaction with Houser, and afterwards coming into court and testifying to it as her witness, it does not lie in the mouth of Houser, a mere mortgagee, to contest the fact. He does not need the statute of frauds to protect his mortgage, and will not be suffered to set it up to defeat an interest he never paid for, and which it was the intention of Bowman and himself to preserve to Miss Lamont. To set up the statute, which Bowman refused to plead, would be a fraud, by protecting him in that which he neither bought nor paid for.

These views cover all the assignments of error, and the judgment is therefore affirmed.

DEED INTENDED AS SECURITY FOR DEBT IS MORTGAGE: *De Wolf v. Strader*, 79 Am. Dec. 371, and note collecting prior cases in this series; and it can only be used to enforce the payment of the money secured by it: *Williams v. Row*, 62 Pa. St. 123, citing the principal case. It may also be shown by parol evidence to be a security: *Sweetzer's Appeal*, 71 Id. 273, citing the principal case; note to *De Wolf v. Strader*, *supra*.

STATUTE OF FRAUDS MAY BE WAIVED by a vendor of real property: *Appeal of Lloyd*, 82 Pa. St. 488; and the statute cannot be taken advantage of by a mere intruder: *Rockland etc. Coal and Oil Co. v. McCalmont*, 72 Id. 226, both citing the principal case; but see the principal case distinguished in *Payne's Adm'r v. Patterson's Adm'rs*, 77 Id. 137, in which the vendor interposed the statute. See further, as to the waiver of the statute by a failure to plead it, *Tarleton v. Vietes*, 41 Am. Dec. 193, and note; *Switzer v. Skiles*, 44 Id. 723; *Osborne v. Endicott*, 65 Id. 498; *Burt v. Wilson*, 87 Id. 142.

STAIR v. YORK NATIONAL BANK.

[55 PENNSYLVANIA STATE, 364.]

PAYMENT TO ADMINISTRATOR OF DECEASED ADMINISTRATOR IS INVALID. ADMINISTRATOR DE BONIS NON IS PROPER PARTY TO RECOVER DEPOSIT BELONGING TO ESTATE, made by a deceased executor.

DECLARATIONS OF EXECUTOR THAT MONEY DEPOSITED IN HIS NAME BELONGED TO ESTATE ARE ADMISSIBLE in an action by the administrator *de bonis non* against the bank to recover the deposit.

OWNERSHIP OF DEPOSIT CAN BE SHOWN TO BE DIFFERENT FROM APPARENT OWNERSHIP imparted by the entry in the bank-book; but whether the bank is chargeable to the true owner must depend upon the circumstances of the case.

DEPOSIT BY SHERIFF TO CREDIT OF HIS OFFICIAL ACCOUNT IS PRIMA FACIE EVIDENCE ONLY that the money came to his hands in some official transaction.

BANK MAY DEMAND INDEMNITY, it seems, on paying over a deposit to which there are conflicting claims.

ASSUMPSIT by George W. Stair, administrator *de bonis non* of George Shearer, deceased, against the York National Bank, to recover a deposit, claimed by the plaintiff to belong to the estate, and for the amount of which the plaintiff had presented his check to the bank, payment of which had been refused. The facts are stated in the opinion.

E. H. Weiser, for the plaintiff in error.

J. Evans and J. L. Mayer, for the defendant in error.

By Court, AGNEW, J. The administrator *de bonis non* is the proper party to recover the assets of the decedent's estate in the hands of a former administrator or his representative, and to sue on promises made to him in his representative capacity: - Act of the 24th of February, 1834, sec. 31. A payment to the administrator of a deceased administrator is invalid: *Musser v. Eckhart*, 19 Pa. St. 201; *Little v. Watton*, 23 Id. 164. If the deposit in question in this case belonged to the estate of George Shearer, deceased, the plaintiff, as administrator *de bonis non cum testamento annexo*, was entitled to recover it. The simple question, therefore, was, whether the bank held money deposited by W. W. Wolf, the deceased executor of the will of George Shearer, belonging to his estate. The plaintiff gave evidence that Wolf, as executor of Shearer, had filed an inventory amounting to \$509.50, including a certificate of deposit of Shearer with C. Weiser and Son of \$385, and that David Small, the administrator of W. W. Wolf, had filed his account of Wolf's administration of Shearer's estate to the time of his

death, charging him with the amount of this inventory, and also the interest on the deposit with Weiser and Son, amounting to \$15.40. He then gave evidence that W. W. Wolf had received of Weiser and Son the amount of the certificate of deposit with them,—\$385,—and \$15.40 interest, on the 20th of April, 1865; and that on the next day, April 21st, he deposited in the York Bank \$415.40, and at the time of so doing got the clerk of the bank to note on his bank or pass book "Shearer's Est." opposite the sum of \$415.40. At this time Wolf was sheriff of York County, and kept an account in bank as sheriff, and so entitled. The clerk entered this deposit as cash in the books of the bank in Wolf's account as sheriff. The account in the pass-book was also so entitled. The clerk testified that he also made other memoranda in this pass-book at Wolf's request, as a guide to him, as Wolf expressed it. The plaintiff offered a witness to prove that Wolf asked him to become his surety in a bond for the sale of the real estate of George Shearer under an order of the orphans' court, and at the same time pointed to the entry of \$415.40, April 21, 1865, in his bank-book, and said, "Here is the money of George Shearer's personal estate," stating also he intended to distribute it after the sale of the real estate. The court rejected this offer. On this evidence, the defendant having given none, the court directed a verdict for the defendant. The question now is, therefore, whether the plaintiff had given and offered to give such evidence of ownership of the deposit by Shearer's estate as ought to have been submitted to the jury. The court excluded the evidence offered, on the ground that it was incompetent to use Wolf's declarations to charge the bank with a trust as to this fund without its privity. But the purpose of the evidence was not to charge the bank without its privity, but to prove the true ownership of the fund. The admissions of Wolf were undoubtedly evidence that the fund deposited did not belong to himself personally or officially, especially in corroboration of the entry in his pass-book caused by him to be made at the time of the deposit. Whether the bank would be chargeable with the deposit in favor of Shearer's estate would depend on other circumstances. As the case stood upon the evidence, the money remained in the bank, and it was liable to pay it to the proper party to receive it. There was no evidence that the bank had paid it out to Wolf himself or to his successor in office, or had become fixed or liable for it to some third party.

by attachment, or by any act founded upon the apparent state of the account on its books. This left the question to be decided on the evidence,—to whom the bank was liable to pay it. *Prima facie*, as the account stood in the books, the sheriff's successor in office was the proper party to receive the fund: *Allegheny Bank's Appeal*, 48 Pa. St. 328. But as between the bank and the depositor, while the fund is still held by the bank, and it has not been misled by the apparent ownership indicated by the state of the account to pay it out, or to incur responsibility for it to others by its own act or by the act of the law, the ownership of the fund can be shown to be different from the apparent ownership imported by the entry in the book. Such, I take it, is clearly the principle to be extracted from the following cases, without stating them in detail: *Frazier v. Erie Bank*, 8 Watts & S. 18; *Harrisburg Bank v. Tyler*, 3 Id. 373; *United States Bank v. Macalester*, 9 Pa. St. 475; *Bank of Northern Liberties v. Jones*, 42 Id. 541. In the last case the industry and research of our brother Read has brought together many of the authorities bearing on this point. The effect of them all is to show that the true ownership of the fund may be proved to be in another than the person in whose name the deposit is made; but whether the bank is chargeable to the true owner must depend upon the circumstances of the case. This qualification is well illustrated by the case of *Frazier v. Erie Bank*, *supra*, where the bank was held liable only for a part of the deposit,—so much as remained on hand at the time of notice of the true ownership of the fund. In a question of actual ownership, there can be no difference whether Wolf made the deposit in his personal or his official account. It was not an appropriation of the fund in the sense of payment, or any other act which vested a right of property in the fund in some third party. The deposit to the credit of the official account as sheriff was simply *prima facie* evidence that the money had come to his hands in some official transaction, but it imported ownership in no particular person. It was therefore as competent to rebut this *prima facie* effect by proof of actual ownership as if the deposit had been in Wolf's personal account. It is not to be doubted that Wolf himself, who controlled the account, could have withdrawn the money from the official account and carried it over to its true place in the settlement of Shearer's estate.

It does not appear from the evidence that the bank required indemnity at the time the plaintiff presented his check and

demanded the money. In such a case, where there may be conflicting demands, and the bank stands as a mere stakeholder, it would have a right to demand indemnity against a call for payment by Wolf's successor in office. But the court can yet compel the plaintiff to tender a bond with sufficient surety before a verdict is suffered to pass in his favor. The judgment, however, must be reversed to enable the parties to have a fair trial of the questions involved.

Judgment reversed, and a *venire facias de novo* awarded.

THE PRINCIPAL CASE IS CITED in *First National Bank v. Mason*, 95 Pa. St. 117; *McDermott v. Miners' Savings Bank*, 100 Id. 287, to the point that money deposited in a bank to the credit of one person may be shown to be the property of another; in *Farmers' etc. National Bank v. King*, 57 Id. 206, 207, to the point that a deposit does not change the property in trust funds deposited by a trustee; and in *First National Bank v. Mason*, *supra*, to the point that the credit on the books of the bank is but *prima facie* evidence of ownership.

BEEGLE v. WENTZ.

[55 PENNSYLVANIA STATE, 369.]

RESULTING TRUST IS CREATED IN CREDITOR FOR DEBTOR as to a part of the debtor's land which the creditor verbally agreed to reconvey to the debtor, if he would waive his exemption and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be bought in by the creditor.

RESULTING TRUST WILL BE UPHELD, although the title to the land is acquired through a judicial sale.

RESULTING TRUST WILL BE UPHELD AGAINST OBJECTION OF UNCERTAINTY, where a creditor verbally agreed to reconvey to the debtor fifteen acres of land around the debtor's house, part of a tract of fifty-eight acres, if the debtor would waive his exemption, and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be bought in by the creditor. The law presumes that the land was meant to be laid off in a reasonable shape, and the parties can afterwards do it, or if one will not, the other can, on notice.

EJECTMENT by F. D. Beegle against Daniel Wentz and wife to recover fifteen acres of land, brought September 1, 1864. On April 10, 1858, Wentz gave the plaintiff a note for \$67.38, containing a waiver of the exemption laws. The plaintiff, in May, 1858, recovered a judgment on this note, issued execution, and levied upon a tract of fifty-eight acres, worth not more than \$300, including the land in controversy. In April, 1858, about the time the levy was made, Wentz claimed the benefit of the exemption laws, and the sheriff summoned ap-

praisers, who were on the ground ready to proceed. The plaintiff then entered into a new arrangement with Wentz, by which he procured from him and his wife a waiver of the exemption indorsed upon the writ for a purported valuable consideration. The land was afterwards sold by the sheriff to the plaintiff, and a deed given September 1, 1859. The defendants proved, against the plaintiff's objection, that the exemption was waived in consideration of the plaintiff's agreement not to take from Wentz and wife their house, but to leave it with fifteen acres as a home to them, and to bid off the entire tract at sheriff's sale, and make a deed of the fifteen acres. The defendants filed a draft, and proved, against the plaintiff's objection, that it represented the land in a reasonable shape around the house in which they resided. There was a verdict for the defendants. The plaintiff assigned as error the admission of the evidence objected to, and the charge to the jury in reference thereto.

Spang and Kimmel, for the plaintiff in error.

J. Cessna, for the defendants in error.

By Court, AGNEW, J. We must throw out of the case the waiver of the exemption laws contained in the note on which the judgment was entered. After the execution had issued, Wentz demanded the three-hundred-dollar provision, and the sheriff summoned appraisers, who were on the ground ready to proceed. If Beegle considered the waiver contained in the note sufficient for his purpose, he had nothing to do but to object to the appraisement, indemnify the sheriff, and proceed with the execution; or if the sheriff held the appraisement, to apply to the court to set it aside. This he did not; but entered into a new arrangement with Wentz, by which he procured from him and his wife a waiver of the exemption, indorsed upon the writ, for a valuable consideration. This consideration is proved to be the agreement of Beegle not to take from Wentz and wife their house, but to leave it, with fifteen acres, as a home to them; and that if they would waive the exemption, he would buy in the whole tract at sheriff's sale, and make them a deed for the fifteen acres. According to the proof, the whole tract, containing fifty-eight acres, was not worth more than three hundred dollars.

The distinguishing feature of the case is, that the agreement of Wentz was not to acquire a new interest in the land by parol; but he was the owner of the land, had a title both

legal and equitable, and a right to retain so much of the land as would be of the value of three hundred dollars. It was this subsisting title which Beegle procured Wentz to forego by his promise to leave him his house and fifteen acres, and make over to him the sheriff's deed for that part. This part he was not to take, but to hold in trust. His language was, he did not want to take their home from them; that he would give them a home of fifteen acres, provided Wentz would sign some agreement to let him sell the whole tract; and he would buy the land and give them a sheriff's deed for the fifteen acres.

It presents, therefore, the case of a resulting trust, and falls within the principle of *Sheriff v. Neal*, 6 Watts, 534, *McCullough v. Cowher*, 5 Watts & S. 427, *Miller v. Pearce*, 6 Id. 97, *Morey v. Herrick*, 18 Pa. St. 123, and *Plumer v. Reed*, 39 Id. 46. In the last case, the opinion was delivered by the present chief justice, and the facts run upon all-fours with the present case. There the defendant was in possession, and made a small improvement upon 116 acres of land, under a purchase by articles on which he paid only five dollars. In order to enable the plaintiffs to purchase a large tract of land of his vendor, including the part he had bought, he agreed to cancel his contract on the promise of the plaintiffs to give him a deed for the ten acres on which his improvement lay; and it was held in this court that a trust arose out of their promise as an inducement to him to part with the title he had to enable them to make the purchase of the whole. The trust in such cases arises *ex maleficio*, on the principle that equity will not permit one to deprive another of a title he actually has by such a promise not intended to be performed. In fact, two equitable principles enter into the transaction: 1. The ownership of the land, which is the equivalent of paying for it, for certainly an actual estate in the land is as good as the money paid for it; 2. The absolute fraud which characterizes the non-fulfillment of the very inducement which led the owner to part with his estate. Thus, in this case, there was both title and possession to the whole tract, and a right to retain so much as would fill the exemption. This right Wentz was induced to surrender on the false assurance, which the jury has found, that his house and fifteen acres should be left to him, and secured by the sheriff's deed. Clearly, to this extent there is a resulting trust *ex maleficio* in Beegle for Wentz; and it is not within the act of 1856, which excepts

trusts or confidences arising by implication or construction of law. Nor does it make any difference that the title was acquired by Beegle through a judicial sale. When the trust arises in a fraud, it vitiates all deeds, private or judicial: *Hoffman v. Strohecker*, 7 Watts, 86 [32 Am. Dec. 740]; *M'Kenna v. Pry*, 6 Id. 137; *Gilbert v. Hoffman*, 2 Id. 66 [26 Am. Dec. 103]; *Small v. Jones*, 1 Watts & S. 138; *Jackson v. Summerville*, 13 Pa. St. 369; *Martin v. Gernandt*, 19 Id. 128, 129. Under the instruction of the court, the jury has found the intention of Beegle to entrap Wentz into the waiver, not intending to comply with his promise.

But it is said the fifteen acres were not laid off, and therefore, from the uncertainty, no trust arose. This is not a case of absolute uncertainty, the house being a fixed object, and the fifteen acres were to surround it. The meaning of the parties was clear, — to preserve to the defendant fifteen acres of ground around the house as a home. In such a case, the law presumes that it is meant to be laid off in a reasonable shape, and the parties can afterwards do it; or if one will not, the other can, on notice to him of doing it. Such is the principle decided in *Coxe v. Blanden*, 1 Watts, 536 [26 Am. Dec. 83], *Krider v. Lafferty*, 1 Whart. 317, and *Brotherton v. Livingston*, 3 Watts & S. 337, in which it was held that a want of designation can be supplied by the election of the grantee. See also Thomas's Coke, 452. A survey was made by Wentz, which was in proof, the reasonableness of which was to be judged of by the jury.

Upon the whole, we find no error, and the judgment of the court below is affirmed.

ONE WHO PROCURES PROPERTY OF ANOTHER BY ARTIFICE OR FRAUD IS TRUSTEE *ex maleficio*: See *Ryan v. Dox*, 90 Am. Dec. 696, and note. The principal case is cited to this point in *Seichrist's Appeal*, 66 Pa. St. 242; *Faust v. Haas*, 73 Id. 301; *Wolford v. Herrington*, 74 Id. 313; Id., 86 Id. 43, 44; *Cowperthwaite v. First National Bank*, 102 Id. 402; *Church v. Kidd*, 5 Thomp. & C. 461; *Newton v. Taylor*, 32 Ohio St. 412. Nor does it make any difference that the title was acquired through a judicial sale: *Boynston v. Housler*, 73 Pa. St. 458. Such trusts are not within the statute of frauds: *Church v. Ruland*, 64 Id. 442.

VALIDITY OF CONVEYANCE, OR AGREEMENT TO CONVEY, DEFINING QUANTITY BUT NOT BOUNDARIES: See *Coxe v. Blanden*, 26 Am. Dec. 83, and note. The principal case is approved in *Biddle v. Noble*, 68 Pa. St. 291, as to the manner of laying off a certain number of acres of land, agreed to be sold, but the boundaries of which were not defined by the parties; and see it also referred to in *Tryon v. Munson*, 77 Id. 259, as recognizing the principle of *Coxe v. Blanden*, *supra*.

CASEBEER v. MOWRY.

[55 PENNSYLVANIA STATE, 419.]

JUDGMENT IN PRIOR ACTION FOR NUISANCE ESTABLISHES PLAINTIFF'S RIGHT AND DEFENDANT'S WRONG, but not the amount of damages, in a subsequent action between the same parties for a continuance of the nuisance, although such judgment did not exist when the subsequent action was brought.

OWNER OF DAM, ALTHOUGH ERECTED ON HIS OWN LAND, IS ANSWERABLE FOR INJURIES to the land of another occasioned or enhanced by the dam, not only in ordinary stages of the water, but in ordinarily recurring freshets.

ONE CANNOT WITH IMPUNITY INVADE PREMISES OF ANOTHER BY NUISANCE, because the damage may be inappreciable. The law allows the recovery of nominal damages, at least, as evidence of the plaintiff's right.

CASE. The facts are sufficiently stated in the opinion.

A. J. Colborn, for the plaintiff in error.

S. Gaither, for the defendant in error.

By Court, THOMPSON, J. This was an action for the continuance of a nuisance by flooding the plaintiff's land. The suit was brought in 1865; and there was a verdict and judgment for the defendant on the 7th of February, 1867. A previous suit for the same nuisance, occasioned by the same dam, and between the same parties, had been brought in 1862. It was tried in February, 1865, and there was a verdict for three cents damages in favor of the plaintiff, on which judgment was entered on the 9th of February, 1866; that was a year before the trial of the case before us.

On the trial of this case below the plaintiff gave the verdict and judgment in the previous case in evidence; but the learned judge charged that it was not conclusive on the defendant, because it did not exist when the suit was brought. This was an error. In *Duffy v. Lytle*, 5 Watts, 120, this is conclusively settled. The *syllabus*, which very accurately represents the ruling of the court, states the principle thus: "A prior judgment upon the same cause of action sustains the plea of a former recovery, although the judgment is in an action commenced subsequently to the one in which it is pleaded." The date is of no consequence; it is the fact of an adjudication upon the same subject-matter, and between the same parties, which gives effect to the former recovery. Now, the operation of the rule is the same, whether the record be pleaded by one or other of the parties. Of course the adjudication only establishes the right of the plaintiff and the wrong of the defendant,

but not the amount of damages. Although in the first action nominal damages only may have been given, that establishes the right, and in a second real damages may be recovered, if shown. On the question of the amount of damages all above nominal may be contested. Hence, in this case the admission of testimony as to this point was not error. But there was error in the ruling as to the effect of the former recovery. Of course this is only so if the dam was of the same height when the second suit was brought. That it was so we may infer from the fact that nothing was alleged to the contrary.

If the tail-race of defendant's mill, made on the plaintiff's land, was an injury, occasioned by the defendant's dam, the conclusiveness of the former verdict and judgment would be the same as to it as to any other portion of the land. But it is an incomprehensible idea to me how land below the dam should be injured by its back flow. If injured, the trespass should be remedied in some way appropriate to its character. We have not the declaration, as we ought to have had in these cases. Nor have we any plot or diagram, to enable us to understand this matter, perhaps, as we might do if we had them, and therefore we will say nothing further in regard to this part of the case. The case of *Rockwell v. Langley*, 19 Pa. St. 502, is important as showing how far special issues after first finding are allowable.

We think the learned judge was bound to affirm the plaintiff's fourth point. The owner of a dam, although erected on his own land, is answerable to his neighbor for injury to his land in times of ordinary freshets, occasioned or enhanced by the dam. This doctrine is clearly announced in *Bell v. McClintock*, 9 Watts, 119 [34 Am. Dec. 507], and rules the point. In erecting this dam, the owner is bound to regard his neighbor's rights and security, not only in ordinary stages of water, but in those stages occasioned by ordinarily recurring freshets. If by his dam he aggravates the injury of an ordinary freshet, he will be responsible. He ought to provide against this in erecting his dam; if he cannot, then it is a case in which he must procure a license from his neighbor to suit the exigency, or not erect it at all. This assignment of error is sustained.

The court committed another error, we think, in applying in effect the doctrine *de minimis* to a case of this kind. The amount of damages is not the sole object of an action of this nature. The right is the great question. It will not do to

hold that one man may with impunity invade the premises of another by anything in the shape of a nuisance, because the damage may not be appreciable. The law does not justify or excuse any such invasion, be it ever so small, and allows the recovery of nominal damages at least as evidence of the plaintiff's right: *Alexander v. Kerr*, 2 Rawle, 83; *Ripka v. Sergeant*, 7 Watts & S. 9 [42 Am. Dec. 214], to which many other authorities might be added.

It was said by the learned judge in his charge that the plaintiff in the second action claimed but nominal damages. This he did in the first; and as the first verdict and judgment on the score of conclusiveness of his right to maintain the action was as effectual as a dozen, it looks as if the object in pressing it to trial was to afflict the defendant with costs and expenses,—certainly not a neighborly incentive by any means,—and this may have involuntarily operated somewhat on the second trial; yet he was entitled to the exact measure of the law in his case notwithstanding, whether the surmise be just or unjust. Under the circumstances, we reluctantly reverse the judgment, as we learn that the defendant reduced his dam after the first finding, showing a proper and prompt obedience to the law. Whether sufficiently reduced or not, we do not know, and intimate nothing more than in our opinion this would have been a more proper subject of inquiry, if not satisfactory to the plaintiff, than a repetition merely of the first controversy.

Judgment reversed, and *venire de novo* awarded.

DAM-OWNER'S LIABILITY FOR INJURIES OCCASIONED BY DAM: See *McCoy v. Danley*, 57 Am. Dec. 680, and note discussing the subject; *Cowles v. Kidder*, 57 Id. 287; *Fraler v. Sears Union Water Co.*, 73 Id. 562; *Bassett v. Salisbury Mfg. Co.*, 82 Id. 179; *Brown v. Brown*, 86 Id. 406. The principal case is cited in *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 243, to the point that a lower riparian proprietor has no right to so construct his dam as, in times of ordinary freshets, to throw the water back upon the premises of the proprietor above.

RUSH v. VOUGHT.

[55 PENNSYLVANIA STATE, 437.]

CLAIMANT IN SHERIFF'S INTERPLEADER IS NOT OBLIGED TO ESTABLISH TITLE TO EVERY ITEM in the sheriff's levy in order to have a verdict in his favor.

WIFE IS ENTITLED TO BENEFIT OF PRODUCTS OR AVAILS OF LAND when the evidence clearly shows the land to be her separate property.

PRODUCTS OF WIFE'S SEPARATE ESTATE AND PROPERTY PROCURED THEREWITH BELONG TO WIFE, and cannot be reached by her husband's creditors because the labor of her husband and children entered into the products.

OWNERSHIP OF LAND CARRIES WITH IT RIGHT TO ITS PRODUCTS, at law and in equity. No change can take place in the title to the fruits of the soil, without the owner parts with his title or possession, or permits its cultivation for the benefit of another.

LABOR OF OTHERS FOR OWNER OF SOIL CREATES NO TITLE TO PRODUCTS, though mingling in the production.

EQUITY WILL ENFORCE TRUST OR CONTRACT, but cannot create a title where none exists.

CREDITORS CAN WORK OUT EQUITIES ONLY THROUGH RIGHTS OF PARTIES, where there is no fraud.

DEBTOR CANNOT BE COMPELLED TO LABOR FOR HIS CREDITORS, nor have they a remedy against his personal efforts.

HUSBAND DOES NOT ACQUIRE TITLE TO PRODUCTS OF WIFE'S FARM merely by the labor which he voluntarily bestows upon it, where he is permitted in the enjoyment of the marital relation to live and be maintained upon the farm which the wife manages for her own use.

MINOR CHILDREN MAY ASSIST WITH FATHER'S ASSENT IN WORK ON WIFE'S FARM without giving the husband any title to the products, the children being entitled by the terms of the deed to their maintenance from it.

FEIGNED issue under the sheriff's interpleader act, to try the right to certain personal property levied upon by the sheriff as the property of Jacob Rush. Ruth Rush, the wife of Jacob Rush, was the claimant, and was made plaintiff, and Simon Vought and others, execution creditors, were made defendants. Further facts appear in the opinion.

G. F. Baer, for the plaintiff in error.

A. J. Colborn, for the defendants in error.

By Court, AGNEW, J. The court below seems to have fallen into several errors in this case.

The question on trial in the feigned issue was, whether the right of property in certain goods and chattels levied in execution, or any of them, was in Mrs. Rush. The court thought that if she failed to establish her title to all of the numerous items in the sheriff's levy a verdict must pass against her. This is hard law, and is not correct. Whatever weight an un-

founded claim to a part might have with a jury, the law does not adopt it as conclusive against her whole claim. It would not be singular if in the course of five or six years' farming Mrs. Rush should be unable to show that some of the articles on the farm were purchased with the products of her land. The penalty is severe, that a failure as to some should be a forfeiture of all. The principle of this case is ruled by *Van Winkle v. Young*, 37 Pa. St. 214; see also *Garrison's Appeal*, 38 Id. 531.

The learned judge erred also in his charge. He seems to have thought that if the labor of her husband and children entered into the products of her farm in the least degree, there was such a mingling of interests, the whole was necessarily subjected to her husband's creditors. The stress laid in many of our decisions upon the necessity of a wife's proving fully, clearly, and satisfactorily that the purchase was made with her own means when she claims it as hers, seems to have led away the mind of the learned judge. We do hold the rule most stringently, and that even a purchase on credit or payment with her own labor will not avail: See *Baringer v. Steiver*, 49 Pa. St. 129; and *Flick v. Devries*, 50 Id. 266, and cases there cited. As a rule of evidence, it is necessary to hold it firmly to prevent frauds by enabling a wife to become a receptacle for the property of her husband clandestinely thrown into her lap. But when the evidence clearly shows a separate property of the wife's own, as in this case, to refuse to give her the benefit of its products or avails on slight and insufficient grounds is to deny to her the rights of ownership and to expunge the statute which protects her use and enjoyment of it.

The undisputed evidence shows that the farm on which Mrs. Rush and her husband and children lived was conveyed to her by Catherine Ogg, her mother, for the maintenance of herself and her children by Jacob Rush during her lifetime, with remainder to these children at her death. The farm was a large one, having one hundred acres cleared. Jacob Rush became insolvent in 1860, his property, less than three hundred dollars in value, being retained by him as exempt from execution. Mrs. Rush thereupon took the entire management of the farm into her own hands, farming it chiefly by the labor of her children, her husband doing but little of the work. The testimony is, that he generally sowed the grain. She bought and sold and traded with the produce of her farm, and the result of her management appears in the fact that after

supporting the family and paying store bills, the property on the farm levied upon was appraised at \$1,651.65. A jury would have but little doubt upon the evidence that the horses, cattle, sheep, and swine which stocked the land were the result of her purchases with the products of the farm and the increase therefrom.

All these were swept from Mrs. Rush by the application of a single principle, which the learned judge stated in these words: "The labor on the farm was bestowed by her husband and his children, and the grain, hay, and other crops raised were the joint products of such labor and the land; and if the personal property now claimed by the wife was paid for out of the products, the husband had an interest in it. It cannot, therefore, be said to have been purchased and paid for out of the separate funds of the wife." Thus the sowing of the grain, which was Jacob Rush's chief labor, mingling with the tillage, carried away from Mrs. Rush not only all the products of the soil (hay as well as grain), but the stock purchased with their proceeds when converted by Mrs. Rush into money or bartered. A deduction which leads to such a wholesale destruction of a wife's rights of property cannot be founded in correct principle. The error arose from an oversight of the true foundation of the wife's right. This is not the case of property purchased during coverture, where the price of it presumptively if not actually came from the husband. But here the title to the products grows out of the title to the land itself. The ownership of the farm carries with it, at law and in equity, the right to its products. No change can take place in the title to the fruits of the soil without the owner parts with his title or possession, or permits its cultivation for the benefit of another. But the labor of others for the owner, though mingling in the production, creates no title to the products. The owner may be a debtor for the labor which tills his soil, or that labor may be given without a required equivalent, or for an equivalent in maintenance which is consumed in its use; but this gives no usufruct or ownership in the product of the tillage. It matters not, therefore, whether the labor, when thus rendered, be that of the husband or another; without a contract for the product or cultivation by the husband for himself, it confers no title or usufruct. In this case, it will be remembered that the evidence shows that Mrs. Rush farmed and managed her own land, and that her husband lived upon it, but as one of the family. Her estate being for life only, he had no title by

curtesy, and he made no pretense even to cultivate the land for himself. It is not the case of a farm owned or cultivated by the husband, in whom, for the reasons already stated, the title to the products would vest. The marital relation, therefore, in this case, gave the husband no ownership of the products of his wife's farm merely because he assisted partly in its tillage, her use and enjoyment of the property being protected by the act of 1848.

But it is said the labor of the husband belongs to his creditors, and it is the folly of the wife to suffer him to mingle it with the products of her property, and the creditor must be permitted in equity to follow it into these products; otherwise a fraud will be perpetrated. This has several answers. Equity will enforce a trust or a contract, but cannot create a title where none exists. The title to the products being a legal incident to the ownership of the land, equity cannot create another ownership contrary to the legal title, and against the intention of the parties. Creditors can work out equities only through the rights of the parties where there is no fraud. But here the wife was the owner in her own right, and the husband bargained for no title to the products in return for his services. He had not even a lien. He was a member of the family, lived with his wife upon her property, and enjoyed its benefits in the shape of a maintenance from it. The marriage relation was not severed by her ownership of the property on which they lived, and which she devoted to the support of her husband and children. The law favors rather than it discourages their joint occupation of it, in so far as it tends to preserve and fortify the marital relation.

The act of 1848, which declares that a married woman's property shall be owned, used, and enjoyed as her own separate property, was not intended to sever this relation in order to secure to her the benefits of her ownership. As has been well shown in *Walker v. Reamy*, 36 Pa. St. 410, and *Manderback v. Mock*, 29 Id. 43, there is a community of interest and possession of the wife's separate property which the act of 1848 does not forbid a wife to share with her husband. But if the marriage relation were not so great a favorite of the law, and if equity would assume to protect the interests of creditors in the labor of the husband, evidently it has no rule by which to measure their rights in this case. How is it possible to follow this labor into the several products of the farm, and to ascertain the proportion which has gone into each; and then to fol-

low their proceeds after conversion into the stock purchased? Admitting that his labor could be valued in gross, yet how could it be apportioned to each product? The result of the doctrine of the court below was to forfeit the wife's title whenever the least portion of the husband's labor constituted a part, however small, of the cost of its production. But this is contrary as well to the spirit of the marital relation as to the doctrine that equity abhors penalties and forfeitures. In such a confusion of labor and product, the wife's legal title must prevail.

There is another answer still more elemental. There is no law which compels a debtor to labor for his creditors, or gives them a remedy against his personal efforts. The slavery of person to the claims of creditors disappeared with the non-imprisonment act of 1842. But even before that law, there was no known remedy enabling creditors to take the labor of their debtor and apply it to their debts. It could neither be seized nor attached. It is only when labor appears in the form of property it can be subjected to the payment of debts, if tangible to execution; or if in action, to attachment. The farm laborer gains a debt for wages, but no title to the products of his work, and if he labors for his maintenance, which is consumed in the acquisition, his creditor has no remedy against the product. The latter cannot make a new contract for his debtor, nor compel the employer to deliver to him the products of his debtor's labor. It is clear, therefore, upon elementary principles, that a husband who is permitted, in the enjoyment of his marital relation, to live and be maintained upon the property of his wife, which she manages for her own use and benefit, does not acquire a title to the products of her farm merely by the labor which he voluntarily bestows upon it. There is a class of cases in this state of which the leading one is *Holdship v. Patterson*, 7 Watts, 547, in which these principles are fully sustained. Gibson, C. J., there says: "The tangible earnings of the husband would be liable to execution, but he was not under even a moral obligation to restrict his efforts exclusively to the liquidation of them. He might lawfully devote himself to the maintenance of his family only." See also *Manderback v. Mock*, 29 Pa. St. 43; *Gillespie v. Miller*, 37 Id. 247; *McCullough v. Porter*, 4 Watts & S. 177 [39 Am. Dec. 68]; *Keeny v. Good*, 18 Pa. St. 354.

But it is thought that the right of Jacob Rush to the services of his children qualifies Mrs. Rush's right of property in

the products of the farm. Addison Rush, a son, testifies that he got his clothes and boarding for his work; that his mother carried on the farm, and supported the family. Indeed, all the witnesses testify that she managed the farm, and provided for the family, and that the boys at home worked on the farm. Under the terms of the deed the children were entitled to their maintenance and support from the property during the life of their mother. There is, therefore, no reason that with their father's assent they should not assist to make that productive which was to furnish their own support. It is manifest that Jacob Rush did not dissent from the arrangement, but permitted his children to aid their mother in furnishing to them the support which it was his own duty to provide. He therefore relinquished his parental right to their labor. The case consequently falls within the decision in *McCloskey v. Cyphert*, 27 Pa. St. 220, in which it was held that a father may emancipate his son's labor and suffer it to go to the benefit of the son; and it is said that he is not bound to work his children as he would a horse or a slave for the benefit of his creditors. But if there were no evidence from which the jury might infer that Jacob Rush permitted his sons to labor for their mother and themselves, the same reasoning already used would apply to the title of the products of the farm in their case. Their labor would confer no title upon him. The right to the products would still follow the ownership and management of the land itself. Equity would not interfere to invest Jacob Rush with a title in the products commensurate with the labor voluntarily bestowed by his sons in the tilling of the ground.

We think the court fell into a fundamental error which affected all its rulings, and the case should go back for another trial upon the principles indicated in this opinion.

Judgment reversed, and a *venire facias de novo* awarded.

MARRIED WOMAN IS ENTITLED TO PRODUCTS AND AVAILS OF HER SEPARATE PROPERTY under the Pennsylvania legislation: *Bucher v. Ream*, 68 Pa. St. 426; *Halcomb v. People's Savings Bank*, 92 Id. 343; no matter whose labor may have been expended in the production: *Leimbach v. Templin*, 105 Id. 526; *Bucher v. Ream*, *supra*; and cannot be reached by her husband's creditors: *Brown v. Pendleton*, 60 Id. 422, 423; *Musser v. Gardner*, 66 Id. 247; *Silveus's Ex'rs v. Porter*, 74 Id. 451; *Seeds v. Kahler*, 76 Id. 267. The principal case is cited to the foregoing points. See also *Glidden v. Taylor*, 91 Am. Dec. 98, as to whether the creditors of the husband are entitled to the profits arising from the husband's use of his wife's property.

THE PRINCIPAL CASE IS ALSO CITED in *Beaver v. Bare*, 104 Pa. St. 62, on the point that the emancipation by a father of his child may be as perfect when they live together under the same roof as when they are separated; and in *Pier v. Siegel*, 107 Id. 508, to the effect that a married woman cannot buy either real or personal estate upon credit, unless she is the owner of a separate estate, in which case she contracts upon the credit of such estate.

SIEGEL v. ROBINSON.

[56 PENNSYLVANIA STATE, 19.]

LAWS OF ANOTHER STATE CANNOT BE RELIED UPON WITHOUT PROOF OF THEIR EXISTENCE, where the question at issue involves a conflict of laws.

OMISSION OF COURT BELOW TO INSTRUCT ON ANY POINT CANNOT BE COMPLAINED OF, where the court was not asked to give such instruction.

PENNSYLVANIA STATUTE OF FRAUDS DOES NOT APPLY TO PAROL CONTRACTS FOR SALE OF LANDS IN ANOTHER STATE, and does not avoid such contracts though made in Pennsylvania.

ACTION of debt by F. M. Robinson against Siegel, Seip, Sider, and Gerline. The plaintiff declared in his first count that the defendants were indebted to him in the sum of \$380, purchase-money due for a tract of land in Trumbell County, Ohio, and that the same had not been paid. He also declared on the common counts. Judgment was entered against Gerline for want of an appearance. There was evidence of a parol contract in Pennsylvania, between the plaintiff and defendants, for the sale of the land mentioned in the declaration; payment of part of the purchase-money; staking out part of the land for a well, etc. The evidence was not certified by the judge. Verdict for the plaintiff for \$384.61. Defendants removed the case to the supreme court, and assigned errors. The nature of the first three errors assigned appears in the opinion. The fourth was, that there was no evidence of Gerline's being a party to the alleged contract. Other facts are stated in the opinion.

J. R. Thompson and J. C. Marshall, for the plaintiffs in error.

S. Marvin, for the defendant in error.

By Court, STRONG, J. The errors assigned to the charge of the court are not well founded. They all represent that instructions were given to the jury, which we do not find in the charge as it appears of record. The jury were not directed

that the plaintiff was entitled to recover, or that notwithstanding the contract was void under the laws of Pennsylvania, it was binding and would be enforced under the laws of the state of Ohio, or that the law of Ohio controlled the right of the plaintiff to recover. The first three assignments, therefore, rest upon a mistaken apprehension of the charge. The defendants submitted the proposition that the statutes of Ohio, where the land they had contracted to buy is situated, forbid the enforcement of parol contracts for the purchase and sale of real estate, and that consequently the plaintiff could not recover, though the contract was made in this state. This proposition the court declined to affirm, because there was no evidence given that such is the statute law of Ohio. In this, surely, the court was right: *Phillips v. Gregg*, 10 Watts, 158 [36 Am. Dec. 158]; and to this no error is assigned. But it is urged, the court should have instructed the jury the plaintiff was not entitled to recover, because the contract was void by the laws of Pennsylvania. It would be a sufficient answer to this, that the court was not asked to give such instruction. But the contract was not void under our law. Our statute of frauds does not apply to parol sales of lands outside of the state. It certainly does not avoid such contracts.

The fourth assignment of error is not sustained. We have not the evidence certified, and we are therefore unable to say there was no evidence that Gerline was not a party to the contract. This point does not appear to have been raised in the court below. Besides, Gerline had confessed his liability by submitting to a judgment.

Nor is there any substantial defect in the declaration.

Judgment affirmed.

LAW OF FOREIGN COUNTRY MUST BE PLEADED AND PROVED AS FACTS where they are relied on: See *Peck v. Hibbard*, 62 Am. Dec. 606, note 613; *Whidden v. Seelye*, 63 Id. 661, note 665; *Brimhall v. Van Campen*, 82 Id. 118, note 121.

PARTY CANNOT COMPLAIN OF FAILURE OF COURT TO GIVE JURY INSTRUCTIONS which he has neglected to ask; but this rule does not apply where the charge given by the court upon the questions involved is itself erroneous: *Chamblee v. Tarbox*, 84 Am. Dec. 614.

DOES STATUTE OF FRAUDS APPLY TO CONTRACTS MADE BEYOND STATE? It has been held in England that an action will not lie in the courts of that country to enforce an oral agreement made in France, and valid in France, which if made in England could not, by reason of the statute of frauds, have been sued upon in England: *Leroux v. Brown*, 12 Com. B. 801. This case was commented upon in *Britain v. Rossiter*, 11 Q. B. D. 128; *Adams v. Clutter-*

buck, 10 Id. 406; and criticised in *Williams v. Wheeler*, 8 Com. B., N. S., 311; but it seems not yet to have been overruled. In *Adams v. Clutterbuck*, *supra*, it was said that *Leroux v. Brown*, *supra*, turned on the provisions of the statute of frauds, the very language of which indicates that it is part of the *lex fori*, and not of the *lex loci*. And in *Britain v. Rossiter*, *supra*, it was said that if the contrary view had prevailed in *Leroux v. Brown*, *supra*, it would have been decided in that case that the fourth section of the statute of frauds had a territorial operation; whereas, if it applied merely to the enforcement of the contract, then it is a statute with respect to the procedure of the English courts, and it is applicable to contracts made abroad as well as in England. In *Green v. Lewis*, 26 U. C. Q. B. 618, citing *Leroux v. Brown*, *supra*, it was held that a contract made and valid in Illinois could be enforced in Canada, though not in writing. The validity of transfers of real estate is determined by the *lex rei sitæ*: *Doyle v. McGuire*, 38 Iowa, 410; *Bissell v. Terry*, 69 Ill. 184; *Danner v. Brewer*, 69 Ala. 191. This rule is applicable not only to the form and manner of the conveyances or contracts affecting lands, but to the rights of parties thereto, and to their capacity to contract: *Id.* Thus in Illinois it has been held that a conveyance on contract for the sale of land situate in that state is governed by the laws of Illinois, and not those of another state where the contract is made: *Bissell v. Terry*, 69 Ill. 184. It seems that the New York statute of frauds is not applicable to contracts made in that state for the sale of lands in other states: *Burrell v. Root*, 40 N. Y. 496. A marriage contract is governed by the law of the state where it is to be performed. Thus where a resident of Illinois made a parol nuptial agreement in 1848 in Pennsylvania, where he was married, and immediately removed to Illinois, where the contract was to be performed, it was held that the law of Illinois governed, as to its effect and validity, and not that of Pennsylvania: *Davenport v. Karnes*, 70 Ill. 465. Where the agent of a person doing business in another state contracts with a merchant in Indiana for the sale of a bill of goods for a price exceeding fifty dollars, and no part of the property is received by the purchaser, no earnest is given to bind the bargain or in part payment, and no note or memorandum is signed by the party to be charged, or his lawfully authorized agent, such contract is an Indiana contract, and void by the statute of frauds: *Hausman v. Nye*, 62 Ind. 485.

But the statute of frauds of Alabama does not apply to property brought into that state by a tenant for life holding under a deed or will executed beyond that state, although the tenant for life and the remaindermen resided in Alabama at the time of the execution of the deed or probate of the will, and continued to reside there: *Turner v. Fenner*, 19 Ala. 361. The fact that wheat contracted to be sold and delivered in Illinois is to be paid for on its arrival in Missouri, will not subject the contract to the operation of the Missouri statute of frauds: *Houghtaling v. Ball*, 19 Mo. 84; S. C., 59 Am. Dec. 331. So no action can be maintained in Kentucky on a contract for services made in Illinois and to be performed in Louisiana, though void under the statute of frauds, and although it might be enforceable in Illinois or Louisiana: *Kleeman v. Collins*, 9 Bush, 460. But in an action on account in Indiana, for intoxicating liquors sold and delivered by the plaintiff, a resident of Wisconsin, to the defendant, a resident of Iowa, pursuant to a verbal order for the liquors, given by the latter to the former, in Iowa, the defendant answered, alleging that such sale was made in violation of a statute of Iowa prohibiting the sale of intoxicating liquors, and made a copy of such statute a part of his answer. The answer was held sufficient on demurrer; and a reply that such sale was also in violation of the statute of frauds of Iowa,

because not in writing, but that the plaintiff had avoided the effect of both such statutes by delivering the goods in Wisconsin, for transportation, to a railroad company designated by the parties at the time such contract was made, was held insufficient on demurrer: *Keiwert v. Meyer*, 62 Ind. 587. In *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 22, the question was raised but not decided as to whether the statute of frauds of New York applied to a contract made in another state, in the absence of proof of the existence of any such statute in the last-named state. But in Missouri it has been held that if a party in the courts of that state relies upon the Illinois statute of frauds, the burden is upon him of showing the existence of such a statute: *Houghtaling v. Ball*, 19 Mo. 84; S. C., 59 Am. Dec. 331. When a contract made in one jurisdiction is to be performed in another, the law of the latter governs as to the interpretation, requirements, and effect of the contract, as well as to the time, mode, and manner of performance; and in some respects also as to its validity: *Pickering v. Fisk*, 6 Vt. 107. Thus a verbal contract made in Germany in 1873, by which A employed B to work for one year from the following May, at \$2.50 per day, where the parties intended the contract to be performed in New York, was held to be governed by the laws of that state, and such contract was there declared void by the statute of frauds of New York: *Turnow v. Hochstadter*, 7 Hun, 80. In *Fox v. Matthews*, 33 Miss. 433, it is held that the courts of Mississippi will enforce a verbal contract of slaves made in Louisiana, if no objection be made in the court below to the introduction of parol proof establishing it.

PENROSE v. ERIE CANAL COMPANY.

[56 PENNSYLVANIA STATE, 46.]

ALTERATIONS MAY BE MADE IN REMEDIES, though the creditor may thereby be hindered and delayed, if they do not substantially deprive him of the right he had when the contract was made.

STATE LEGISLATURE CANNOT ENACT THAT DEBTOR'S PROPERTY SHALL NOT BE TAKEN TO SATISFY HIS DEBT, if it was so liable when the debt was incurred.

ACT OF APRIL 9, 1850, SEC. 1, TO REGULATE SEQUESTRATIONS IN CASE OF ERIE CANAL COMPANY, by making its property liable only in cases of mismanagement, misapplication of funds, or willful delay in discharging its legal liabilities, where it was prior to that act subject to execution for its debts, is unconstitutional, and does not affect rights of creditors existing when that act was passed.

THE main facts of this case are stated in the opinion. The plaintiff, having a judgment, petitioned the court, and prayed it to award a writ to sequester the property of the defendant corporation. The answer of defendant alleged that the petition did not set forth that the said corporation "was guilty of mismanagement, misapplication of its funds, or willful delay in the discharging of its legal liabilities, or either of them"; and that the petition was not verified on oath, charging such mismanagement, misapplication, or delay specifically, as re-

quired by section 1, act of April 9, 1850, Pamphlet Laws, 437. Defendant therefore claimed that plaintiff had no authority to sequester its property. The court dismissed the petition at plaintiff's costs. Plaintiff appealed.

B. Grant, for the appellant.

J. C. Marshall and D. Derrickson, for the appellee.

By Court, STRONG, J. This appeal calls in question the constitutional validity of the first section of an act of assembly passed the ninth day of April, 1850, and entitled "An act to limit and regulate sequestrations in case of the Erie Canal Company." The plaintiff has a judgment against the company founded on a debt contracted in the years 1846 and 1847, and due before the passage of the act to which reference has been made. Having caused an execution to be issued, to which the sheriff returned *nulla bona*, she would be entitled, under the act of 1836 relating to executions, to sequestration of the property of defendants, of the tolls and receipts of their canal, and of all their goods, chattels, and credits, rents, issues, and profits, were it not for a supposed change in the law made by the act of 1850. The question, therefore, is, whether that act is of force or whether it is invalid as a violation of the provision of the federal constitution that denies to the states power to make a law impairing the obligation of contracts.

In construing this provision of the constitution, the supreme court of the United States early made a distinction between the obligation of a contract and the legal remedy for its breach, holding that while the obligation may not be impaired, the remedy to enforce it may be changed, and even partially taken away. It is doubtless true that the constitution was never intended to stereotype the laws of the different states which at the time of its adoption provided remedies for the enforcement of contracts, or to deprive the states of the power to substitute others in place of those then existing. And yet if by the obligation of a contract is meant its legal force at the time it is entered into, it is difficult to see how a remedy can be diminished or partially taken away, and still the obligation remain unimpaired, unless another equally efficient is provided in its stead. An obligation without any means of enforcing it certainly is not a legal one, and just in proportion as the means of compelling the performance of a contract are taken away, it would seem must its legal effect be diminished. It is, however, settled that alterations may

be made in the remedies provided by law, though the creditor may thereby be hindered and delayed, if they do not substantially deprive him of the right he had when the contract was made, and assured to him by it.

It is upon this principle that stay laws for a reasonable time are held constitutional, though a law providing for an indefinite stay is not: *Bunn v. Gorgas*, 41 Pa. St. 441. So it has been held that exemption of the person of a debtor from arrest or imprisonment is permissible as only acting upon the remedy, even when allowed by law after a contract made, but the exemption of the property of a debtor from attachment or execution, though apparently equally a modification of remedy, is prohibited by the constitution. Admitting that these distinctions are not clearly defined in reason, we must accept them as made.

Certain it is that it is not competent for a state legislature to throw a barrier around the property of the debtor, and enact that it shall not be taken to satisfy his debt, if it was liable to such seizure and appropriation when the debt was incurred. A legal obligation can have no existence where both the person and property of the debtor are placed by law beyond the reach of the creditor.

If now we examine what rights the contract in this case gave when it was made, or, which is the same thing, what was the extent of the legal obligation assumed by the defendants, and then inquire into the meaning of the first section of the act of 1850, we may determine without difficulty whether the enactment is prohibited by the constitution. To ascertain the extent of the creditor's rights we must look beyond the words of the contract. We must look at the law as it was at the time, for that entered into the contract, and was itself the measure of the defendant's obligation. By the act of 1836, relating to executions, a creditor by contract of a canal company after having obtained judgment, and after a return of *nulla bona* to an execution issued thereon, was entitled to have the tolls, rents, issues, and profits of the company, together with all its rights and credits, seized and applied to the payment of his claim ratably with the claims of others.

This could be effected by a writ of sequestration, and it was the only means of obtaining satisfaction of the debt if an execution proved fruitless. This right to sequestration was not dependent at all upon the manner in which the canal company might manage its property. It was absolute. Indeed, it may

well be supposed that without it credit would not have been given in many cases. The tolls, rents, issues, and profits are the principal security of a creditor of such a corporation. Neither the canal itself, nor the franchise of the company, could be sold, except at the suit of mortgagees; and if the tolls and profits could not have been seized, the creditor would have been remediless.

Sequestration was therefore a substantial right, and assured by the contract. I do not say that some other process might not have been substituted for it,—some process that would have given the creditor equal facilities for appropriation of the tolls, rents, credits, etc., of the company; but the right to have that property appropriated in some way to the satisfaction of the debt was undoubtedly assured by the contract. Such, then, were the rights which the plaintiff had when the act of 1850 was passed. By that it was enacted that it should not be lawful to grant a writ of sequestration and to appoint a sequestrator when a return of *nulla bona* had been made to an execution against the Erie Canal Company, except upon the judgment and decree of the court on hearing that the corporation is guilty of mismanagement, misapplication of funds, or willful delay in discharging its legal liabilities. The act provided no substitute for sequestration in those cases where it would have been allowable before its passage, but not afterwards. It is remarkable that it applies, not to corporations generally, but singly to these defendants. It attempts to establish a rule for them alone. It gives them an exemption denied to all other canal companies or corporations. And it is plain that it may amount to a complete exemption of all their property from ever being applied in any degree to the satisfaction of the debt due the plaintiff. The company may never be guilty of mismanagement. It ought to be presumed they will not. The corporation may never misapply its funds. It may devote them exclusively to the payment of other debts. It may never be guilty of willful delay in discharging its legal liabilities, and therefore, if this enactment is valid, and there is no misconduct of the corporation, its property,—the only means it has for satisfying its debts,—is forever withdrawn from the reach of the plaintiff. Under the shelter of this act, the tolls are no longer a security, absolute and unconditional. It is impossible to say that this is not impairing the obligation of a contract, in view of the construction given to the constitutional inhibition by the supreme court of the United States,

and especially with *McCracken v. Haywood*, 2 How. 608, before us. No one would contend that a law exempting all a natural person's property from seizure for satisfaction of his debts until he had been proved guilty of mismanaging it, or of willful delay or of misapplication of his funds, could stand an hour, except as applicable to contracts made after its enactments. The creditor's right is not dependent upon the conduct of the debtor. And is a different rule to be applied to cases where a corporation is a contracting party?

We are constrained, then, to hold that the act of 1850 is invalid, because prohibited by the federal constitution. The order of the common pleas dismissing the petition of the plaintiff must be reversed.

The decree of the court of common pleas dismissing the petition of the plaintiff is reversed, and the record is remitted, with instructions to award a writ of sequestration.

LEGISLATIVE CONTROL OVER REMEDIES. — As to the first point in the syllabus, *supra*, see *Coriell v. Ham*, 61 Am. Dec. 134; *Briscoe v. Anketell*, 61 Id. 553; *Lord v. Chadbourne*, 66 Id. 290; *Coffin v. Rich*, 71 Id. 559; *Von Baumbach v. Bade*, 76 Id. 283; *Reapers' Bank v. Willard*, 76 Id. 755; *Scobey v. Gibson*, 79 Id. 490, note 494; *Moore v. Luce*, 72 Id. 629; *Richardson v. Cook*, 88 Id. 622. But no law impairing the obligation of contracts is constitutional: *Trustees etc. v. Bailey*, 81 Id. 194; and when the remedy is an essential part of the contract, it cannot be changed: *Coffman v. Bank of Kentucky*, 90 Id. 311. As to when obligation of contracts is impaired by law respecting the remedy, see *Western etc. Society v. Philadelphia*, 72 Id. 730; *Scobey v. Gibson*, 79 Id. 490, extended note thereto on statute impairing obligation of contracts 495, 496; *Von Baumbach v. Bade*, 76 Id. 283, note 293; *Robinson v. Magee*, 70 Id. 638, where it is held that the right and the remedy must stand or fall together; to deny the latter is to impair the former. Remedy afforded by existing laws enters into and forms part of the obligation of contracts: *Von Baumbach v. Bade*, 76 Id. 283; *Western etc. Society v. Philadelphia*, 72 Id. 730. The legislature may change the mode of enforcing obligations, whether of individuals or corporations: *Reapers' Bank v. Willard*, 76 Id. 755.

LAW TENDING TO DELAY COLLECTION OF DEBTS IS INOPERATIVE UPON EXISTING CONTRACTS: *Scobey v. Gibson*, 79 Am. Dec. 490. But see *Morse v. Gould*, 62 Id. 103, note 112, where it is held that statutes enlarging exemptions of property from execution are not unconstitutional as impairing the obligation of contracts, even if applied to debts contracted before their passage. They affect the remedy only.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: While the obligation of contracts cannot be impaired, the remedy to enforce them may be changed and even partially taken away; and laws changing the remedy for the enforcement of legal contracts will be considered valid though the new remedy be less convenient or less prompt and speedy than the old: *Long's Appeal*, 87 Pa. St. 119. A law prohibiting the sale of property under execution, unless it will bring two thirds of its appraised valuation, is unconstitutional and void: *Williams's Appeal*, 72 Id. 218.

MOSIER'S APPEAL.

[56 PENNSYLVANIA STATE, 76.]

SUBROGATION IS EQUITABLE RESULT PURELY, and depends on facts to develop its necessity, that justice may be done.

PRIVITY OF CONTRACT IS NOT NECESSARY TO SUPPORT SUBROGATION. It exists upon principles of mere equity and benevolence.

SUBROGATION WILL NOT ARISE IN FAVOR OF MERE STRANGER, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor.

SUBROGATION DOES NOT APPLY IN FAVOR OF MERE VOLUNTEERS. They can obtain the right of substitution only by contract.

CASES ILLUSTRATING WHO ARE NOT TO BE REGARDED AS VOLUNTEERS AND STRANGERS with respect to the right of subrogation.

SUBROGATION IS APPLICABLE WHEREVER PAYMENT IS MADE under a legitimate and fair effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated.

ENTRY OF SATISFACTION OF JUDGMENT DOES NOT EXTINGUISH JUDGMENT except in favor of intervening liens.

EXAMPLE OF PRINCIPLES OF SUBROGATION APPLIED. — A number of judgments were entered against two debtors, some joint and some several, executions were issued, and land held jointly by them was levied on. The court ordered the undivided interest of one of the debtors to be sold separately. A junior judgment creditor, believing the land would be sacrificed, after the execution plaintiffs had refused to assign their judgments to him on payment, paid the executions to the sheriff, and satisfaction was entered. No other liens having intervened, he was subrogated to the rights of the execution plaintiffs, and the satisfaction canceled.

THE Olmsteads, E. and C. H., were joint owners of real estate in Meadville, valued at from fifty thousand to sixty thousand dollars. They were deeply in debt in 1866, and judgments to a very large amount were standing against them severally and jointly. Executions returnable in November, 1866, were issued upon the following judgments against them: First National Bank of Susquehanna Depot, to the use of C. A. Derrickson and G. Mosier, against C. Olmstead et al., entered November 28, 1865, for \$4,042.60; First National Bank of Meadville against E. Olmstead and C. H. Olmstead, entered February 2, 1866, for \$4,393.49; J. R. Dick & Co. against E. Olmstead, entered February 7, 1866, for \$1,025; J. R. Dick & Co. against E. Olmstead and C. H. Olmstead, entered February 7, 1866, for \$5,000; J. R. Dick & Co. against E. Olmstead, entered March 22, 1866, for \$921.24; G. Mosier against E. Olmstead, C. Olmstead et al., entered March 30, 1866, for \$2,815; S. G. Thurston against C. H. Olmstead et al.,

entered August 13, 1866, for \$600. Other judgments had been entered against the Olmsteads before, between, and after those above mentioned. The property of the Olmsteads was advertised to be sold, under the executions named, on November 12, 1866, but the sale was continued until the 14th. C. H. Olmstead, alleging that he was surety for E. Olmstead in the judgments against both, applied to the court to direct the sheriff to sell only the interest of E. Olmstead in their joint real estate, and to exhaust all of E. Olmstead's property before resorting to his. E. Olmstead and the lien creditors other than the execution creditors resisted this application on the ground that such a sale would sacrifice their interests. The court made the order as prayed for. The defendants and judgment creditors junior to the execution creditors, considering that the sale as ordered would prejudice their interests, requested Dick & Co. to pay the executions, hold the judgments as indemnity, and stop the sale. Dick & Co. being also desirous to protect their own judgments, offered to pay the execution plaintiffs, but they refused to assign their judgments. Dick & Co. then paid the execution debts to the sheriff, and the sale was stopped. On each execution the sheriff returned "money paid in full of debt, interest, and costs." The judgments were marked "satisfied" on the record. The Olmsteads afterwards gave judgment notes to Dick & Co. for the amount paid by the latter to the sheriff, and judgments were entered on the same on November 14th and 30th. Mosier and Derrickson, on November 14th, entered a judgment against C. H. Olmstead for twenty-five thousand dollars. This judgment was marked "satisfied," March 4, 1867, and was alleged in the appellees' statement to be merely an indemnity. After the payment to the sheriff by Dick & Co., there were no liens entered against the Olmsteads, except the judgments last mentioned. J. R. Dick & Co. presented a petition setting forth the facts, and prayed the court to strike off and set aside the entry of satisfaction in the judgments paid by them, and subrogate and substitute said J. R. Dick & Co. in the place and stead of said plaintiffs. Mosier answered, setting forth that he owned a judgment on which there was then due \$1,700; that he owned one half of a judgment for the payment of \$25,000,—both of which were subsequent to the claims of J. R. Dick & Co., the last of which judgments was entered after the satisfaction of the judgments paid by Dick & Co.; that he owned

one half of a judgment for \$6,500, which was subsequent to all the judgments of Dick & Co., except that for \$921.24; and that all of said judgments were subsisting liens against E. and C. H. Olmstead; averring that E. Olmstead paid \$8,167.56 of the amount due on the executions; that Dick & Co. paid \$4,403.71; that G. C. Porter paid \$880.87; and that judgments were given by the Olmsteads for the amounts so paid in satisfaction of the money paid the sheriff. It was further averred in his answer that the whole amount of judgments due J. R. Dick & Co. from the said Olmsteads was \$6,946; that \$6,025 of the money due Dick & Co. was among the prior liens of those against the said Olmsteads; that the petitioner was ready to purchase the undivided one half of the Olmstead block owned by the said Olmsteads, for which he would have paid \$28,000, which was the full value of the same; that the real estate of the said Olmsteads, independent of the said block, would sell for \$19,000; and that the equities of Dick & Co. were not such as should prevail as against the rights of subsequent and intervening judgment creditors. E. Cushin and R. H. Grafton, judgment creditors, put in similar answers, and alleged in addition that in the event of the subrogation prayed for, their judgments would not be paid. There was evidence that the real estate would sell better in subdivisions; that if the sale had been made as ordered by the court, Mosier's and Derrickson's claims would have been paid; that arrangements had been made to discharge the claims against C. H. Olmstead if the sale had gone on; that real estate was depreciating in Meadville; and that the money to pay the executions was handed to the sheriff by E. Olmstead, S. B. Dick, and G. C. Porter. There was evidence for petitioners that E. Olmstead had opposed the sale of the property as ordered by the court; that the property would have been sacrificed by such sale; that the Dicks provided the money which paid the executions; that their judgment of \$921.24 would not have been reached if the property had been sold as ordered; that it would probably be paid if the joint interest should be sold; that it was to protect their judgments, and at the request of E. Olmstead, that they paid the executions; and that they acted under the advice of counsel. On December 29, 1866, the court decreed that J. R. Dick & Co. be subrogated to the rights of the plaintiffs in the judgments, stating them, and be substituted as plaintiffs therein; that said judgments be marked for their use; that the entries of

satisfaction on said judgments respectively be canceled, annulled, and set aside; and that the respondents pay the costs of this proceeding. Mosier, Cushin, and Grafton appealed, and assigned the decree of the court below for error.

W. R. Bole, for the appellants.

P. Church and G. Church, for the appellees.

By Court, THOMPSON, C. J. Subrogation is purely an equitable result, and depends, like other controversies in equity, on facts to develop its necessity, in order that justice may be done. Privity of contract is not necessary to its support; it may and does exist on principles of mere equity and benevolence: *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *Cottrel's Appeal*, 23 Pa. St. 294. It will not arise in favor of a stranger, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. For instance, a surety who pays the debt of his principal will be entitled to the securities of the creditor. So where one of several joint sureties has paid the whole debt, he will be entitled to the judgment to enforce contribution by his co-sureties: *Croft v. Moore*, 9 Watts, 451. In *Cottrel's Appeal*, *supra*, to prevent a sale the defendant in the judgment gave his note with an indorser, to the plaintiff, for the amount of the judgment, and took up the single bill on which the judgment had been entered. The note went to protest, and was paid by the indorser, and it was held that the indorser was entitled to be subrogated to the judgment of the plaintiff, which the proceeds of his note went to pay, in preference to a subsequent judgment, entered previously to the giving of the note.

In *Silver Lake Bank v. North*, 4 Johns. Ch. 370, a mortgagee, compelled for his own security to satisfy an execution on a prior judgment in favor of another, was by Chancellor Kent held by right of subrogation to stand in the place of the judgment creditor, and entitled, on a sale of the mortgaged premises, to receive out of the fund the amount of the judgment as well as the mortgage debt. See also *Paine v. Hathaway*, 3 Ves. 212; Dixon on Subrogation, 166, to the same effect. In *Wallace's Appeal*, 5 Pa. St. 103, it was decided that an administratrix, who had paid her own money in relief of the estate of her intestate, was entitled to substitution to those whose debts her money paid. *Kelchner v. Forney*, 29 Id. 47, was the case of an advance by a guardian to his ward, and he was subrogated to the ward's security for money coming to him. *Greiner's Ap-*

peal, 2 Watts, 414, recognizes the same doctrine, and there are many other decisions to the same effect.

The principles of subrogation do not apply in favor of volunteers, as already said. They can obtain the right of substitution only by contract. The cases which I have referred to above illustrate who are not to be regarded as volunteers and strangers. One was the case of an indorser, who was substituted to the judgment creditor, whose judgment the proceeds of the note paid. His indorsement was voluntary. Another paid off, for his own security, an execution on a prior judgment. He was not legally compelled to pay. A third and fourth advanced money, one in favor of an estate and another to his ward. They were all subrogated, and not regarded as strangers. I regard the doctrine as applicable in all cases, where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated. Such payments, whatever might be their effect in law as extinguishing the indebtedness to which they apply, will not be so regarded in equity, if contrary to equity to regard them so.

In the case in hand it became very apparent, as I think the proof shows, that the order in which the sale of the joint property of E. and C. H. Olmstead was directed to be made by the court, out of which the executions in favor of the First National Bank of Susquehanna Depot against William Hamnet and Charles Olmstead, the First National Bank of Meadville against E. and C. H. Olmstead, S. G. Thurston against W. B. Hunter and C. H. Olmstead, and G. Mosier against E. Olmstead, C. H. Olmstead, and James Irvin, issued, would defeat a junior judgment of J. R. Dick & Co. To save it, and under the pressure of this circumstance, they advanced money to pay off these executions. This was done not only with the knowledge of the defendants, but they were very solicitous that the Dicks should do so, as they believed that the sale of the property in detail, that is, by a sale of an undivided interest at a time, would in a measure sacrifice it. It is very obvious that connected property, as it was, would not sell as well in undivided interests as *in solido*; and as the whole would be required to be sold to pay the liens upon it against the defendants, it is not apparent why such an order was made. But the fact that it was so made, left the Messrs. Dick no alternative but to do as they did, or lose their judgments.

Subrogation to the judgments, the executions on which were paid by the money of the Messrs. Dick, was applied for and resisted; not by new lien creditors, but by those existing when the money was paid. It is true, the appellants claim that there was an intervening judgment in favor of G. Mosier and C. Derrickson against C. H. Olmstead for twenty-five thousand dollars entered. Why this judgment should have been made the foundation of objection, I do not see, for it was marked "satisfied in full." on the docket; and at the time of the decree, its nature was understood to be merely cautionary, with nothing due on it. The case stood solely as it did between the creditors when the money was paid, and when the decree in this case was entered. Their liens were, in legal contemplation, in no way impaired by the acts of the appellees. They were not postponed in any of their legal rights or remedies. Any of those whose judgments were ripe for execution might have proceeded to put the property to sale the next day after it was stopped by the payment of the executions, if they had chosen. The entry of satisfaction on the judgments by the plaintiffs did not extinguish them, excepting in favor of intervening liens, of which, as we have seen, there were none; and equity would not allow its principles to be set aside by an act against equity, which the satisfaction entered would result in. The right of subrogation having been found to exist, it was certainly proper, on part of the court, to decree that the entry of satisfaction should be canceled, and that the judgments should stand for the use of the plaintiffs in the bill.

The fact that the Messrs. Dick entered judgment against the defendants, E. and C. H. Olmstead, for the money advanced, did not destroy their equity, unless it could have been shown that it was in effect so intended. Nothing of this was shown. The appellants were not prejudiced by the act, and it would be hard to hold that the appellees were, if the former were not.

The case was well decided below, and the decree is affirmed at the costs of the appellant.

SUBROGATION DEFINED: See note to *Roslett v. Grieve's Syndics*, 13 Am. Dec. 297.

SUBROGATION, AS MATTER OF COURSE, WITHOUT ANY AGREEMENT TO THAT EFFECT, ARISES ONLY IN WHAT CASES: *Sandford v. McLean*, 23 Am. Dec. 773.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Subrogation will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor: *Webster's Appeal*, 86 Pa. St. 412. Where a formal discharge of a mortgage has been obtained by mistake or fraudulent means, and a third person pays the mortgage at the request of the debtor, and takes a new mortgage for the same debt, he will be subrogated to the rights of the original mortgagee, as against intervening encumbrances existing at the time of the cancellation of the first mortgage: *Sidener v. Pavey*, 77 Ind. 246; see also *Rardin v. Walpole*, 38 Id. 148; *Wright v. Briggs*, 99 Id. 566, showing the doctrine of subrogation as applicable to mortgages. As to its application between co-sureties, see *Wright v. Grover etc. Co.*, 82 Pa. St. 83. The principal case was summarized in *Steele's Appeal*, 72 Id. 103; *Ackerman's Appeal*, 106 Id. 5; quoted from in *Williamson's Appeal*, 94 Id. 236; *Webster's Appeal*, 86 Id. 412; and relied upon in *Hess's Estate*, 69 Id. 276.

THORP v. WEGEFARTH.

[56 PENNSYLVANIA STATE, 82.]

NATIONAL BANK ASSOCIATION ORGANIZED FROM STATE BANK, and receiving its assets, is liable for its debts.

TO JUDGMENT THERE CAN BE NO SET-OFF OF DEBT NOT IN JUDGMENT.

ONE JUDGMENT MAY BE SET OFF AGAINST ANOTHER THROUGH EQUITABLE POWERS OF COURT; but to a judgment ripe for execution there can be but one answer, to wit, payment pure and simple.

CHOSE IN ACTION AGAINST CREDITOR IS NOT GOOD TENDER IN PAYMENT OF JUDGMENT or execution.

STATE BANK NOTES INEFFECTUAL AS SET-OFF WHEN. — A national bank association was organized from a state bank. Such association recovered judgment for a debt due it, and afterwards became insolvent. The debtor then procured notes of the original state bank, which the association was liable for, to pay his debt. *Held*, that he had no right of set-off against the judgment.

STATE BANK NOTES ARE NOT MONEY UNDER NATIONAL BANKING ACT, and a national bank association is not bound to receive them as such in its own proper business.

STATE BANK NOTES ARE NOT LEGAL TENDER, and capable of performing the functions of a legal satisfaction, unless accepted by the creditor.

THIS was a feigned issue in the court below to try whether a judgment obtained on October 21, 1865, under the circumstances stated below, by the National Bank of Crawford against Wegefarth had "been equitably paid since the rendition of the same." Said bank had been incorporated some time before 1864 by the commonwealth of Pennsylvania. In May, 1865, it became a national bank, under the provisions of the act of the legislature to enable state banks to become national banking associations, under the title above named.

The officers of the state institution and all its assets passed to the new organization, including an amount of the issues of the old institution so large that national currency could not be obtained from the comptroller. In June, 1865, Wegefarth borrowed money from the association. He received the loan in the issue of the state bank. For this loan the association afterwards brought suit, on October 21, 1865. Judgment was entered against him, for want of an affidavit of defense, for \$6,764.27. On this judgment he obtained a stay of execution as a freeholder for twelve months. The bank ceased to do business after March 27, 1866. About October 15, 1866, Wegefarth went to the bank in banking hours with something over the amount he owed in the notes of the old bank to tender in payment of his debt, but found the bank closed. In December he went to the residence of the president, who was also the counsel of the bank, and tendered the amount of his debt in the notes of the old bank, but it was refused. Execution, returnable in February, 1867, was issued on the judgment against Wegefarth; and on his affidavit a rule was granted to show cause why it should not be set aside. On March 12th, the bank made a general assignment for the benefit of creditors to Thorp; after which, upon the hearing of the rule, this feigned issue, in which Thorp was plaintiff and Wegefarth was defendant, was directed. A tender of the old bank notes to the amount of the debt was made at the trial, and again refused. The court charged that the national bank association was liable for the debts of the state bank; that the defendant had a right to pay the judgment against him in the bills of the old bank acquired by him before the assignment was made to Thorp, and tendered in payment before said assignment or notice of the same to defendant; and that the tender to the president and counsel of the bank was a sufficient tender for that purpose. Verdict for the defendant. Plaintiff took a writ of error, and assigned the charge of the court below for error.

P. Church and G. Church, for the plaintiff in error.

W. R. Bole and S. N. Pettis, for the defendant in error.

By Court, AGNEW, J. Under the enabling act of this state, in conjunction with the permissive feature of the national bank law, it may well be conceded that the national banking association became liable for the existing debts and liabilities

of the state bank, when the latter passed into the former, carrying with it all its assets. Had the defendant then been the debtor of the state bank, and also its creditor by possession of its notes of circulation, doubtless the mutual obligation would have remained; and he could have compelled the national bank association to receive the notes of the state bank in payment of his debts, whether the former were insolvent or not. But two important elements in the logic of the defendant's argument are wanting. The defendant was the debtor, not of the state bank, but of the national association; and judgment was obtained for this liability. The defendant was not then the holder of the state bank notes, and even when judgment was obtained, was not the creditor of the national bank by their possession. He therefore had no right of set-off. To a judgment there can be no set-off of a debt not in judgment. One judgment may be set off against another, through the equitable powers of the court, but to a judgment ripe for execution there can be but one answer, to wit, payment pure and simple. The very issue ordered by the court corrects the argument. The judgment was not opened to let the defendant into a pre-existing defense; but the court directed a feigned issue to "try the question whether said judgment has been equitably paid since the rendition of the same." Another fact, important to defendant's argument, is, that he gave no evidence to show that he was the holder of the state bank notes previous to the closing of the doors of the national association; nor indeed for any length of time before his tender in payment. The closing of its doors was on the 27th of March, 1866, and it was not until the following December he made his tender; and then founded his right to make the tender to the president at his private residence on the fact that he had found the doors of the bank closed in the previous October, when he went to make a tender.

Thus after the national bank association had committed an act of insolvency, he purchased its indebtedness, and seeks to pay off his own debt with it. It is understood that the national association was responsible for these notes of the state bank, and when he purchased its notes, he bought only the indebtedness of the national association in becoming its creditor. It is true, its obligation to pay was derivative by operation of the united action of the state and national laws, but its obligation to the defendant was but a cause of action enforceable only by writ.

The state bank issues were not money under the national banking act; and the national association was not bound to receive them as such in its own proper business. Had the defendant held them when sued for the proper claim of the national association against him, he might have set them off as any other cause of action could be defalked, but then he had no cause of action against it. The case, therefore, actually stood thus: The defendant was debtor to the national association for a judgment ripe for execution when the stay expired, and he then stood as a holder of choses in action against the national association, to wit, the notes of the state bank, for which the former was liable at law. In this state of the case, there were several reasons why his tender of the notes was not good. First, there is no such thing as a right to tender a mere chose in action in payment of a judgment or execution. The debts are not of the same quality, and the right to recover the chose has not been judicially determined, which must precede a legal right to use it as payment or set-off to a judgment. Second, the notes themselves were not a legal tender, and capable of performing the functions of a legal satisfaction, unless accepted by the creditor. Third, the insolvency of the bank, evidenced by its closing its doors in the preceding March, fixed the *status* of its debts and the rights of its creditors, preventing them from obtaining a preference in payment.

The fifty-second section forbids all transfers and payments with a view to give a preference.

Now, as the purchase of the state bank notes after the act of insolvency gave no regular equitable right of set-off against the judgment, and as those notes could not *per se* perform the office of legal tenders, the only way in which they could be rendered efficacious in payment of the judgment would be by a mutual act of application of the notes to the judgment, and the judgment to the notes. But this is clearly forbidden by the act of Congress, as shown in the case of *Venango National Bank v. Taylor*, 56 Pa. St. 14.

The judgment is therefore reversed, and a *venire facias de novo* awarded.

RIGHT OF SET-OFF BEFORE JUDGMENT IS STATUTORY ENTIRELY, and exists only in cases provided for by the statute: *Anson v. Houch*, 45 Am. Dec. 133; *Chandler v. Drew*, 26 Id. 704.

ONE JUDGMENT MAY BE SET OFF AGAINST ANOTHER: *Shrines v. Simmons*, 91 Am. Dec. 771; *Gunn's Adm'r v. Todd*, 64 Id. 231; *Lee v. Lee*, 76 Id. 681, and

note 684; *Ramsay's Appeal*, 27 Id. 301, note 307; *People v. New York Common Pleas*, 28 Id. 495. Nothing can be set off unless it can be sued upon: *Wallace v. Finnegan*, 90 Id. 243.

STATE BANK BILLS AS SET-OFF: See note to *New Hope Delaware Bridge Co. v. Perry*, 52 Am. Dec. 450.

BANK NOTES AS MONEY: See *F. & M. Bank v. White*, 64 Am. Dec. 772, note 774; note to *New Hope etc. Co. v. Perry*, 52 Id. 448, discussing the law of bank bills; *Crutchfield v. Robins*, 42 Id. 417.

BANK NOTES AS LEGAL TENDER IN PAYMENT OF JUDGMENT OR EXECUTION: See *Welch v. Frost*, 48 Am. Dec. 692; note to *New Hope etc. Co. v. Perry*, 52 Id. 449, 452, discussing the law of bank bills.

BANK NOTES AS PAYMENT: See *Coxe v. State Bank*, 14 Am. Dec. 417; *Northampton Bank v. Ballie*, 42 Id. 297; *Crutchfield v. Robins*, 42 Id. 417; *Ware v. Street*, 75 Id. 755.

CHOSE IN ACTION IS NOT GOOD TENDER IN SATISFACTION OF JUDGMENT: *Crutchfield v. Robins*, 42 Am. Dec. 417.

PAYMENT IN BILLS OF INSOLVENT BANK: See note on the subject to *Ontario Bank v. Lightbody*, 27 Am. Dec. 182, 183.

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EXCLUSIVE POSSESSION AND USE, FOR MORE THAN TWENTY YEARS, of a dock adjoining a wharf extending into tide-water, for loading and unloading vessels, is sufficient, under the Massachusetts statute, to establish title thereto by prescription against the commonwealth. *Nichols v. Boston*, 132.

AGENCY.

1. **ACTION OF AGENT WHICH IS WARRANTED BY TERMS OF HIS POWER is binding upon his principal, as to all persons dealing in good faith with the agent. *Westfield Bank v. Cornen*, 573.**
2. **WHERE AGENT BUYS PERSONAL PROPERTY IN NAME OF HIS PRINCIPAL without indicating his agency, the principal may be held if he afterwards recognizes and acts upon the contract. *Hunter v. Giddings*, 54.**
3. **FACT THAT AGENT MAY BE PERSONALLY HELD UPON CONTRACT FOR SALE OF PERSONAL PROPERTY does not prevent an undisclosed principal from suing upon the contract. *Id.***
4. **AGENT MAY SELL PROPERTY OF HIS PRINCIPAL WITHOUT DISCLOSING FACT THAT HE ACTS AS AGENT, or that the property is not his own, and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. *Winchester v. Howard*, 93.**
5. **EVERY MAN HAS RIGHT TO ELECT WHAT PARTIES HE WILL DEAL WITH. *Id.***
6. **QUESTIONS AS TO CONTRACT SHOULD BE LEFT TO JURY WHEN. — S., being W.'s agent to sell a pair of oxen, concealed his agency in attempting to sell them to H., and in answer to H.'s inquiries, made representations tending to induce H. to believe that they were the property of S. himself, and not of W., with whom H. would not have knowingly contracted, for private reasons, and agreed "that H. might drive them home, and that he would give H. a bill of sale of them the next day, or that H. might drive them back if he did not then find things as S. had told him." H. drove them home, and discovering the same evening that W. claimed to**
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own them, and that they had never been the property of S., for that reason drove them back the next morning, and refused to take a bill of sale either in S.'s or W.'s name. In an action by W. against H. for the price of the oxen, it was held that it should have been left to the jury to determine whether the minds of the parties really met, and if so, what the contract was; further, that upon the whole evidence in this case they would be justified in finding a verdict for the defendant. *Id.*

7. WHERE AUTHORIZED AGENT MAKES PROMISSORY NOTE in form, "I promise to pay," etc., and signs as agent without mentioning his principal, he is liable as maker of the note, notwithstanding the fact that the payee knew he was acting as such agent at the time. *Collins v. Buckeye S. I. Co.*, 612.
8. PAROL EVIDENCE IS INADMISSIBLE TO VARY effect of note by showing an intention to bind the principal only, when such note is made by an agent in form, "I promise to pay," etc., and signed by him as agent, without any mention of his principal, and with knowledge on the part of the payee that the maker is acting only as agent. *Id.*
9. DECLARATIONS OF AGENT WHILE IN EXECUTION OF ACT WITHIN SCOPE OF HIS AUTHORITY are admissible against the principal. *Burnside v. Grand Trunk R'y Co.*, 474.
10. DECLARATIONS OF GENERAL FREIGHT AGENT OF RAILROAD COMPANY concerning goods delivered to him for transportation are admissible against the company, when made while the goods are in transit and the carrier's duty still continues, although made eight months after the goods were so delivered to him. *Id.*
11. FINDING BY JURY THAT DEFENDANT ACTED AS PRINCIPAL IN SALE OF STOCK IS WARRANTED, where, in reply to inquiries of the plaintiff, who was about to buy, he said that he could "let him have some," or "buy him some," that he "would probably get it at a dollar and a half per share," and that the stock "is all right"; it also appearing that the transfer of the certificate to the plaintiff was signed by a person as the defendant's attorney, and that the money was paid to the defendant. *Bradley v. Peole*, 144.

See BROKERS.

ASSIGNMENTS.

See LICENSE, 4.

ATTACHMENT.

1. LEVY OF ATTACHMENT UPON PROPERTY POSSESSING CHARACTERISTICS OF HOMESTEAD does not give to the attaching creditor such a vested interest in the property as to deprive the claimant of the right to claim it as a homestead. The claimant may select and record it at any time before it is actually levied upon under execution. *Hawthorne v. Smith*, 397.
2. ATTACHMENT OR LEVY IS VOID, IF OFFICER UNLAWFULLY GETS POSSESSION OF DEBTOR'S PROPERTY, and then attaches it on meane process, or levies upon it on execution. *Closson v. Morrison*, 459.
3. ATTACHMENT OF PROPERTY TAKEN BY OFFICER FROM PERSON OF ONE ARRESTED FOR COMMISSION OF CRIME IS VOID, if the officer takes the property simply for the purpose of getting possession of it, so that he might attach it on writs which he then held or expected to receive; but if he takes it in good faith, to secure the safe-keeping of the prisoner, an attachment of it by him on a writ which then comes into his hands is valid. *Id.*

4. DEFENDANT UPON DISSOLUTION OF ATTACHMENT IS ENTITLED TO RETURN OF PROPERTY WITHOUT REIMBURSING SHERIFF for charges paid a carrier to get possession of it or for expenses incurred in storing it. *McReady v. Rogers*, 333.
5. LIABILITY OF SURETY ON ATTACHMENT BOND IS SEVERAL AS RESPECTS OBLIGEE in another attachment bond given in another suit against the same defendant in which the same property is attached, and if the attachment is wrongful, each may be proceeded against to judgment, although but one satisfaction can be had. *Id.*
6. SURETY ON ATTACHMENT BOND IS LIABLE IN CASE OF WRONGFUL ATTACHMENT for all damages suffered by the defendant up to the redelivery of the property; and therefore he is liable for the neglect or refusal of the sheriff to return the property upon the dissolution of the writ, notwithstanding the sheriff may be also liable. *Id.*
7. BOTH IN MASSACHUSETTS AND CONNECTICUT, ATTACHMENT BY TRUSTEE PROCESS MAY BE MADE, notwithstanding an action is pending in favor of the debtor against the trustee to recover the same debt; but this rule applies only when both suits are within the same jurisdiction. *Whipple v. Robbins*, 64.
8. WHERE SUIT IN ONE COURT IS COMMENCED PRIOR TO INSTITUTION OF PROCEEDINGS under attachment in another court, such proceedings cannot arrest the suit. *Id.*
9. SUBSEQUENT TRUSTEE PROCESS IS NO ANSWER TO PRIOR ACTION IN ANOTHER JURISDICTION. *Id.*
10. TRUSTEE IS NEVER BY SERVICE OF PROCESS UPON HIM TO BE PLACED IN WORSE POSITION than if he were liable only to the principal defendant, and the plaintiff acquires no greater rights than the defendant himself possesses against the trustee. *Id.*
11. PAYMENT OF EXECUTION ISSUED UPON JUDGMENT IN ACTION IN ANOTHER STATE CHARGING TRUSTEE IN FOREIGN ATTACHMENT IS NO BAR to an action previously commenced against him in Massachusetts by the principal defendant, and in which he had appeared, if the judgment in the other state charging him as trustee was obtained upon his willful default. *Id.*
12. PRESUMPTION SHOULD BE THAT OFFICER ACTED IN GOOD FAITH in taking property from the person of one whom he arrests for the commission of a crime, and attaching the same on a writ which then comes into his hands, if there is no evidence on the question, or the evidence is equally balanced, although the facts should be submitted to the jury, who should find upon a preponderance of all the evidence. *Closson v. Morrison*, 459.

See FACTORS; INSOLVENCY.

ATTORNEY AND CLIENT.

ATTORNEY ONCE ADMITTED TO REPRESENT PARTY CANNOT BE DISCHARGED unless with the consent of the court, until the suit is ended. While his name continues on the record, the adverse party has the right to treat him as the authorized attorney, and the service of notice on him is as valid as if served on the party himself. *Walton v. Sugg*, 580.

BAILMENTS.

1. NOT SALE — TITLE REMAINS IN BAILOR. — Where the owner of personal property delivers it to another under an agreement that the latter is to

keep and carefully use it, and not remove it from the county, and that he is to return it at the end of three months, provided that if he pays the first party an agreed price therefor within that time, he may become the owner of the property, this is not a sale, but a bailment, the title remaining in the first party; and he may maintain replevin to recover his property. *Dunlap v. Gleason*, 231.

2. BAILMENT — REPLEVIN. — Where one to whom property has been bailed for a specified time violates his trust and transfers the property to another, the owner may maintain replevin against the latter, although the term of the bailment has not expired. *Id.*

BANKS AND BANKING.

1. BANKS MAY LAWFULLY PURCHASE REAL ESTATE IN MISSOURI, under the banking act of 1856-57, if the purchase is made in good faith for the purpose of securing a debt due to the bank. *Merchants' Bank v. Harrison*, 285.
2. NATIONAL BANK ASSOCIATION ORGANIZED FROM STATE BANK, and receiving its assets, is liable for its debts. *Thorp v. Wegesarth*, 789.
3. NOTICE TO BANK DIRECTOR WHILE NOT ENGAGED OFFICIALLY in the business of the bank does not affect the bank. *Westfield v. Cornen*, 573.
4. STATE BANK NOTES ARE NOT MONEY UNDER NATIONAL BANKING ACT, and a national bank association is not bound to receive them as such in its own proper business. *Thorp v. Wegesarth*, 789.
5. STATE BANK NOTES ARE NOT LEGAL TENDER, and capable of performing the functions of a legal satisfaction, unless accepted by the creditor. *Id.*
6. ADMINISTRATOR DE BONIS NON IS PROPER PARTY TO RECOVER DEPOSIT BELONGING TO ESTATE, made by a deceased executor. *Stair v. New York Bk. Co.*, 759.
7. DECLARATIONS OF EXECUTOR THAT MONEY DEPOSITED IN HIS NAME BELONGED TO ESTATE ARE ADMISSIBLE in an action by the administrator *de bonis non* against the bank to recover the deposit. *Id.*
8. OWNERSHIP OF DEPOSIT CAN BE SHOWN TO BE DIFFERENT FROM APPARENT OWNERSHIP imparted by the entry in the bank-book; but whether the bank is chargeable to the true owner must depend upon the circumstances of the case. *Id.*
9. DEPOSIT BY SHERIFF TO CREDIT OF HIS OFFICIAL ACCOUNT IS PRIMA FACIE EVIDENCE ONLY that the money came to his hands in some official transaction. *Id.*
10. BANK MAY DEMAND INDEMNITY, it seems, on paying over a deposit to which there are conflicting claims. *Id.*

See SET-OFF.

BIGAMY.

See CRIMINAL LAW, 5-10.

BONDS.

- SURETIES UPON BOND OF PUBLIC OFFICER ARE NOT DISCHARGED** by imposition upon the principals, by the legislature, of further duties and obligations of a nature and character similar to those already taken, — in this case the care of a larger sum of money than usual, of the same nature and from the same source as that which the officer was otherwise bound to care for. *People v. Vilas*, 520.

BROKERS.

1. **REAL ESTATE BROKER BECOMES AGENT OF OWNER WHO EMPLOYS HIM TO SELL OR EXCHANGE LAND**, and who agrees to compensate him for sending a customer with whom a sale or exchange may be effected; and the broker can recover nothing from the owner for his services, although an exchange is thus effected, if he exacted from the customer a conditional promise of compensation before sending him to the owner. *Walker v. Osgood*, 168.
2. **REAL ESTATE BROKER IS AGENT OF VENDOR**. To entitle him to commissions, there must be an employment, and his services must be the immediate and efficient cause of the bargain. *Earp v. Cummins*, 718.
3. **BROKER HAS NO RIGHT TO COMMISSIONS** if his services fail to accomplish a sale, and after the proposed purchaser has decided not to buy, other persons induce him to do so. *Id.*
4. **BROKER MAY RECOVER COMMISSIONS UNDER CONTRACT BY TERMS OF WHICH** he was to receive ten per cent of the price if he should dispose of certain steamers at prices and conditions to be agreed on, where the evidence shows that his action in the matter did direct the attention of the purchasers to the vessels he had for sale, and led to the negotiations which resulted in the purchase of the vessel, although he did not actually make the sale and transfer. *Lyon v. Mitchell*, 502.

See TELEGRAPH, 3, 6.

BURGLARY.

See CRIMINAL LAW, 10.

CHATTEL MORTGAGES.

See MORTGAGES.

COMMON CARRIERS.

1. **COMMON CARRIER DEFINED**. — Where it is one's business for hire to take goods from the custody of their owner, to assume entire possession and control of them, to transport them from place to place, and to deliver them at a point of destination to consignees or agents there authorized to receive them, he is a common carrier, although he styles himself an "express-forwarder," and although he contracts with others to transport the goods in vehicles of which they are the owners, and the movements of which he himself does not manage or control. *Buckland v. Adams Ex. Co.*, 68.
2. **NATURE OF COMMON CARRIER'S CONTRACT**. — Its essence is that goods are to be carried to their destination unless prevented by act of God or the public enemy; and this, whether the goods are carried by land or water, by the carrier himself, or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself, or under his supervision by agents and means of transportation directly and absolutely within his control. *Id.*
3. **COMMON CARRIER MAY LIMIT HIS RESPONSIBILITY BY NOTICE**, if brought home to the consignor, and assented to clearly and unequivocally by him. *Id.*
4. **ASSENT TO RESTRICTION ON LIABILITY OF COMMON CARRIER, CREATED BY NOTICE**, IS NOT TO BE INFERRED from the mere fact that knowledge of such notice on the part of an owner or consignor is shown. The evidence

- must show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered. The facts of this case do not show such assent. *Id.*
6. IN ABSENCE OF STATUTORY PROVISIONS UPON SUBJECT, COMMON CARRIERS MAY LIMIT THEIR LIABILITY by special contract against all risks but their own negligence or misconduct. *Squire v. New York Central R. R. Co.*, 162.
 8. OWNER OR SHIPPER OF LIVE-STOCK MAY AGREE WITH CARRIER, IN CONSIDERATION OF REDUCED RATE OF FREIGHT, to assume the risk of injuries to the animals "in consequence of heat, suffocation, or of being crowded," during transportation by the carrier, and the parties will be bound by the agreement. *Id.*
 7. MEASURE OF OBLIGATION AND SUFFICIENCY OF ACCOMMODATION OF COMMON CARRIER to furnish transportation must be determined by the amount of freight ordinarily carried on any given line of road. This duty of the carrier is not peculiar to any season of the year, or any special emergency which may arise in the course of business; thus if by reason of a sudden or unusual demand for stock or produce in the market, or from any other cause, there should be a sudden and unexpected influx of business, the obligation to carry will be fully met by shipping the freight in the order and priority of time in which it is offered. *Baltimore v. North Missouri R. R. Co.*, 315.
 8. CARRIER'S MEANS OF TRANSPORTATION MUST BE SO DISTRIBUTED at the various stations along the road as to afford a reasonable amount of accommodation for all. One station must not be furnished with means of transportation to the prejudice of another. *Id.*
 9. CARRIER MUST RECEIVE ALL FREIGHT that may be offered, and within a reasonable time, and in the order in which it is offered, transport it to the point designated by the owner or party in charge. This duty must be performed in good faith, without favor or partiality to any one. *Id.*
 10. NEGLIGENCE OF CARRIER IN DELAY IN TRANSPORTING FREIGHT is a question for the jury from all the facts and circumstances in the case. *Id.*
 11. CARRIER IS NOT LIABLE FOR DELAY IN TRANSPORTING FREIGHT, if such delay is occasioned by the act of God; and a snow-storm, which hinders and delays the carrier in the performance of his duty, is such an act as will exonerate him from liability. *Id.*
 12. CARRIER IS RESPONSIBLE FOR NATURAL OR ORDINARY and proximate consequences of his acts, but not for such as are remote and extraordinary; thus if there is a delay in the shipment of stock, and the bad faith of the carrier is shown, the necessary expense in feeding and attending it is the natural and immediate consequence of his act; but for the death or shrinkage in weight in the stock, caused by a storm, he is not liable. *Id.*
 13. WHEN DOES COMMON CARRIER'S LIABILITY AS SUCH CEASE, AND HIS LIABILITY AS WAREHOUSEMAN COMMENCE? Upon this question the courts have held three positions: 1. That this occurs when the goods are placed in a warehouse to await delivery to the consignee; 2. That after they have been placed in a warehouse, the carrier's liability as such continues until the consignee has had a reasonable time in which to remove them; 3. That the carrier's liability continues until he has notified the consignee of the arrival of the goods, and he has had reasonable time in the ordinary course of business to remove them. *McMillan v. Michigan Southern and Northern Indiana Railroad Co.*, 208.

14. **LIABLE AS CARRIER OR WAREHOUSEMAN.** — A common carrier's liability for goods transported by him continues as a carrier until the goods have been placed in a warehouse and the consignee notified of their arrival, and he has had a reasonable time in which to remove them. After that the carrier becomes liable as a warehouseman. *Per Coolcy and Christianity, JJ.; contra, Martin, C. J., and Campbell, J. Id.*
15. **COMMON CARRIERS — LIMITING LIABILITY BY NOTICE OR CONTRACT.** — The provision of the general railroad law preventing railroad companies from lessening or abridging their common-law liabilities as carriers does not prevent the company from entering into an agreement with a consignor of goods by which he specially contracts to limit their liability. *Id.*
16. **COMMON CARRIER — OBLIGATION TO RECEIVE GOODS — LIMITING LIABILITY.** — Carrier by mere notice may make reasonable regulations in regard to the receipt and delivery of goods to him, but, subject to such reasonable regulations, he is bound to receive all articles tendered to him of the kind usually carried by him, subject to his common-law liability, unless the owner consents to his receiving them under a reduced liability. *Id.*
17. **BURDEN OF SHOWING SPECIAL CONTRACT WITH CARRIER LIMITING HIS COMMON-LAW LIABILITY** is on the carrier, and the fact that a restrictive notice has been actually received or seen by the owner of the goods will not raise a presumption that he has assented to its terms. *Id.*
18. **ANY NUMBER OF PAST TRANSACTIONS BY WHICH CONSIGNOR AGREED WITH CARRIER TO LIMIT HIS COMMON-LAW LIABILITY** does not prevent him from insisting on his common-law rights in subsequent shipments; nor will carriers be allowed to establish a usage restricting his liability. *Id.*
19. **BILL OF LADING — PROVISION IN LIMITING CARRIER'S LIABILITY.** — Bill of lading is the contract between the owner and the carrier of goods delivered for transportation; it fixes the rights and liabilities of the parties when its terms have been agreed upon, including a provision limiting the carrier's liability, and the consignor's assent is conclusively presumed from his having accepted it without objection. *Id.*
20. **FACT THAT CONSIGNOR DID NOT READ BILL OF LADING DELIVERED TO HIM,** which contained restrictions of the carrier's liability, does not prevent his being bound by its terms, if there was no fraud practiced upon him. *Id.*
21. **CONSIGNEE ACCEPTING SHIPMENT IS BOUND BY TERMS OF SHIPMENT MADE BY HIS CONSIGNOR;** and the carrier in contracting with the consignor has a right to presume that he has full power in the premises. *Id.*
22. **CONSIDERATION FOR AGREEMENT BY SHIPPER RESTRICTING CARRIER'S COMMON-LAW LIABILITY** will be presumed, in the absence of evidence to the contrary. *Id.*
23. **NOT NEGLIGENCE.** — Where a railroad company transports highly inflammable material, and then delivers it over to a second carrier, where it occasioned a conflagration, the company cannot be held liable for the damage, as if their carrying the material, if negligence, was too remote a cause to charge them. *Id.*
24. **COMMON CARRIER — TRANSPORTATION BEYOND HIS LINE.** — Where a carrier receives goods marked for a particular destination beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over his own line, and forward from its terminus. *Id.*

25. **COMMON CARRIER — CONNECTING LINES — CONTRACT LIMITING LIABILITY.** — Where goods were delivered to a carrier at Cincinnati, and he gave a bill of lading conditioned to deliver them "at Toledo, for Detroit," this is a contract to carry the goods to Toledo and to forward them from thence to Detroit. And where the bill of lading contained provisions limiting the carrier's liability, these provisions only related to the shipment to Toledo, and the carriage from thence was under the carrier's common-law liability. *Id.*
26. **USAGE OF PORT, THAT IN ORDER TO CONSTITUTE DELIVERY OF GOODS BY CARRIER BY WATER** the consignee or his agent must receipt therefor, is both unreasonable and illegal, and evidence of the usage is inadmissible in defense to an action against the consignee for loss of the goods through his negligence. *Reed v. Richardson*, 155.
27. **CARRIER MAY MAINTAIN ACTION AGAINST INTERMEDIATE CONSIGNEE TO RECOVER FOR DEDUCTION OF FREIGHT** made by virtue of a mercantile custom, allowing a deduction for shortage not arising from the fault of the prior carrier, if the deduction was suffered under protest, and the consignee had not accounted with the owner of the cargo when action was commenced. *Strong v. Grand Trunk R. R. Co.*, 184.
28. **BILL OF LADING IS OPEN TO EXPLANATION** like other receipts, and the carrier may show that the actual amount which came to his hands is different from that stated. *Id.*
29. **ALLEGED CUSTOM BY WHICH INTERMEDIATE CONSIGNEE IS AUTHORIZED TO DEDUCT** from back freight earned any deficiency in the cargo, as shown by a comparison of the bill of lading with the measurement of the carrier receiving it, and that the prior carrier shall not be allowed to show that there was error in the bill of lading, is not a custom that the courts will recognize and enforce. *Id.*
30. **COMMON CARRIER MAY MAKE REASONABLE REGULATIONS** as to separation of passengers. *West Chester & P. R. R. Co. v. Miles*, 744.
31. **COMMON CARRIER'S RIGHT TO SEPARATE PASSENGERS IS FOUNDED** upon his private property in the means of conveyance and upon the public interest. *Id.*
32. **COMMON CARRIER'S REGULATION AS TO SEATING PASSENGERS** so as to preserve order and decorum is reasonable and proper, both as regards his right of private property and the public interest. *Id.*
33. **COMMON CARRIER'S REGULATION AS TO SEPARATION OF BLACK FROM WHITE PASSENGERS** is sound and reasonable. *Id.*
34. **RAILROAD COMPANY CANNOT BE HELD LIABLE, EITHER TO OWNER OR AGENT**, on its ordinary contract to carry a passenger, for losing samples of merchandise delivered into its charge by the agent of the owner as his personal baggage; nor in tort, except for gross negligence. *Stimson v. Connecticut R. R. Co.*, 140.
35. **MERE FAILURE OF RAILROAD COMPANY TO DELIVER BAGGAGE OF PASSENGER** at a point on its road is not evidence of negligence on the part of a connecting railroad which sold the passenger tickets over both roads to such point, and checked his baggage accordingly. *Id.*
36. **IMPLIED CONTRACT OF RAILROAD COMPANY TO CARRY PASSENGER SAFELY** INCLUDES the duty of giving him a reasonable opportunity to alight in safety. *Fairmount R'y Co. v. Stutler*, 714.
37. **CARRIER OF PASSENGERS FOR HIRE IS NOT, LIKE COMMON CARRIER OF GOODS, INSURER** against everything but the act of God and public enemies. He is not held to take every possible precaution against

danger; but he is bound to use the utmost care which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient, and suitable vehicles or vessels, and other necessary or appropriate instruments and means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur. *Simmons v. New Bedford V. & N. S. Co.*, 99.

38. **COMMON CARRIER'S COMPLIANCE WITH POSITIVE STATUTE REGULATIONS DOES NOT EXEMPT HIM** from responsibility for neglect to observe all other reasonable precautions against danger. *Id.*
39. **IF COMMON CARRIER FAILS IN HIS DUTY, HE IS RESPONSIBLE FOR CONSEQUENCES OF HIS NEGLIGENCE**, although the negligence or misconduct of a third party contributes to the injury. He is as much bound to guard against the results of the acts of third parties as of any other cause, the operation of which he can reasonably anticipate. *Id.*
40. **OWNERS OF STEAMBOAT MANAGED AND NAVIGATED BY THEIR SERVANTS FOR CARRIAGE OF PASSENGERS FOR HIRE**, on the side of which hangs a small boat suspended over a part of a deck where it is proper for passengers to be, are bound to use the utmost care, consistent with the nature and extent of their business, to keep this boat so secured as to guard against injury by its falling upon any passenger from any cause, including careless or irregular acts of other passengers, which may reasonably be anticipated. *Id.*
41. **ORDINARY CAPACITY AND ORDINARY CARE IN PROTECTING HIMSELF IS ALL THAT IS REQUIRED** of a passenger in a railroad car. *Sheridan v. Brooklyn & N. R. R. Co.*, 490.
42. **SICK OR AGED PERSON OR CHILD IS ENTITLED TO MORE CARE** from a carrier than one in good health and under no disability. *Id.*
43. **RAILROAD COMPANY IS LIABLE IN DAMAGES FOR DEATH OF CHILD** who, being seated in a crowded car, was compelled by the conductor to leave the seat and to stand upon the platform, from which, by the hasty and careless exit of another passenger, he was thrown and killed; and the wrongful act of such passenger would not relieve the company from the consequences of the wrongful act of their conductor in placing the deceased on the platform. *Id.*
44. **PASSENGER RIDING ON STEPS OF PLATFORM OF RAILROAD CAR** is in place of danger and *prima facie* negligent, and in an action for injuries by a collision, the burden is on him to rebut the presumption of negligence arising from such fact, which may be done by showing that the car and platform were full of passengers, with no room for more, and that the conductor stopped the cars to allow him to get on, and called for and received his fare, as this implied on the part of the defendant an invitation to ride in the place in which he did, and also an implied assurance that such place was a suitable and safe place to ride. *Clark v. Eighth Ave. R. R. Co.*, 495.
45. **LAW REQUIRES OF COMMON CARRIERS OF PASSENGERS EXERCISE OF SUCH CARE** on their part, and of their servants, as will insure the safe carriage of their passengers so far as their safety depends upon the diligence and care of those engaged in such carriage, and makes them responsible for any injury sustained from the omission of such care and diligence. *Id.*

46. WHERE, BY REASON OF MISPLACEMENT OF SWITCH BY SERVANT OF RAILROAD COMPANY, a train is diverted from the main track of the railroad to a side-track, and there collides with other cars, and imperils passengers on an adjoining platform, it is competent for a jury to find that the omission to replace the switch was culpable negligence. *Caswell v. Boston & W. R. R. Co.*, 151.
47. QUESTION WHETHER PASSENGER IS BOUND TO WAIT IN STATION-HOUSE OF RAILROAD COMPANY UNTIL ARRIVAL OF TRAIN at a platform provided for passing to trains, or may cross over an intervening side-track and stand on the platform, depends, in the absence of directions thereto, upon what is a reasonably safe and prudent course for him to pursue, in determining which the jury may consider what is the usage of passengers there, and whether such usage is known to and permitted by the company. *Id.*
48. VERDICT IN ACTION AGAINST RAILROAD COMPANY FOR INJURY TO PASSENGER IS WARRANTED, where the passenger, while awaiting a train in a proper place, and believing that she was in danger from the approach of the train in an unexpected direction by reason of the switch being misplaced through culpable negligence of servants of the company, became alarmed, and in running away to escape the apprehended peril, tripped over the rail of the track on which she was running, fell, and was injured, although by running she was brought into a more perilous position than she was in had she remained where she was standing. *Id.*

CONDITIONS.

See ESTATES, 2-5.

CONFLICT OF LAWS.

LAWS OF ANOTHER STATE CANNOT BE RELIED UPON WITHOUT PROOF OF THEIR EXISTENCE, where the question at issue involves a conflict of laws. *Seigel v. Robinson*, 775.

CONSTITUTIONAL LAW.

1. ALTERATIONS MAY BE MADE IN REMEDIES, though the creditor may thereby be hindered and delayed, if they do not substantially deprive him of the right he had when the contract was made. *Penrose v. Erie Canal Co.*, 778.
2. STATE LEGISLATURE CANNOT ENACT THAT DEBTOR'S PROPERTY SHALL NOT BE TAKEN TO SATISFY HIS DEBT, if it was so liable when the debt was incurred. *Id.*
3. ACT OF APRIL 9, 1850, SEC. 1, TO REGULATE SEQUESTRATIONS IN CASE OF ERIE CANAL COMPANY, by making its property liable only in cases of mismanagement, misapplication of funds, or willful delay in discharging its legal liabilities, where it was prior to that act subject to execution for its debts, is unconstitutional, and does not affect rights of creditors existing when that act was passed. *Id.*
4. MISSISSIPPI STATUTE PROHIBITING PROSECUTION OF ACTIONS OR SUITS FOR DEBT against southern soldiers who have been called into active service by the state authorities, while such soldiers are or may be engaged in the military service of any of the southern states, is constitutional. *State v. McGinty*, 264.
5. ORDINANCE OF MISSISSIPPI CONVENTION OF 1861 TO RAISE MEANS FOR DEFENSE of the state, and the tax levied in consequence thereof, were

rendered void by the ordinance of the convention of 1865, which declared the fundamental act of the convention of 1861 to be null and void, and the state can assert no rights founded on and proceeding from those acts. *Id.*

See MORTGAGES, 20.

CONTRACTS.

1. **CONSIDERATION, WHEN SUFFICIENT.** — Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud and with full knowledge of all the circumstances. *Doyle v. Dixon*, 80.
2. **PUBLIC POLICY.** — **CONTRACT TO EMPLOY AGENT TO MAKE OR PROCURE SALE TO GOVERNMENT** of articles needed by it is not rendered void, as against public policy, because at the time of the employment reference was made to the fact that the agent was of the same political faith as the party then administering the government, and that he had many acquaintances among the administration, and a good reputation at the place where the sale was to be made, — all of which might aid in bringing about the sale. Such a case is to be distinguished from that where an interference with legislative action or executive clemency is the object, and wherein the party does not profess to act upon commercial principles. *Lyon v. Mitchell*, 502.
3. **OFFER OF ONE PARTY BY TELEGRAPH AND ACCEPTANCE BY OTHER** through the same means constitute a binding agreement between parties who agree to deal by telegraph, and this, although the acceptance is not received in time to enable the latter party to comply with his proposal in consequence of a derangement of the telegraph line. *Trevor v. Wood*, 511.
4. **CONTRACT CANNOT BE RESCINDED IN TOTO BY ONE PARTY UNLESS BOTH CAN BE PLACED** in the identical situation which they occupied at the time of the contract. *Ware v. Houghton*, 258.
5. **CONTRACT WILL NOT BE REFORMED WHERE NO FRAUD OR MUTUAL MISTAKE IS ALLEGED.** *Story v. Conger*, 546.
6. **RESCISSION OF CONTRACT FOR FRAUD.** — Where one exchanges a lot of personal property for certain land, and the owner of the land delivers to him a conveyance describing the wrong land, if the first party wishes to rescind for the fraud he cannot do so by a mere offer to "trade back"; he must deliver or tender a reconveyance. *Wilbur v. Flood*, 204.
7. **PREMATURE ACTION.** — In replevin, to recover chattels given in consideration for a contract which plaintiff wishes to rescind for fraud, the rescission must be complete, by return or tender of the consideration, before the affidavit is made and the writ issued. *Id.*
8. **PERSON WISHING TO RESCIND CONTRACT FOR FRAUD MUST DO SO WITHIN REASONABLE TIME**, or their right is lost. A delay of fifteen months between neighbors to repudiate a fraudulent exchange is unreasonable. *Id.*

See EQUITY, 7; INFANCY; MARRIED WOMEN; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

CORPORATIONS.

1. **BY ACT OF SUBSCRIBING TO CAPITAL STOCK OF INCORPORATED ASSOCIATION**, EACH ASSOCIATE UNDERTAKES to raise his proportion of the capital as it may be called for by the directors. *Merrimac M. Co. v. Levy*, 697.

2. WHERE DIRECTORS OF INCORPORATED ASSOCIATION ARE AUTHORIZED BY LAW TO CALL IN SUBSCRIPTION, this ordinarily implies a corresponding duty to pay. *Id.*
3. PERSONAL LIABILITY FOR SUBSCRIPTIONS IS CREATED where the articles of association under the law contemplated a substantial capital for defined purposes, both to carry out the object of the corporation and for the protection of creditors. *Id.*
4. PURCHASER FROM ORIGINAL SUBSCRIBER TO STOCK IS SUBSTITUTED to his obligations as well as his rights, and being accepted by the corporation as a stockholder, a privity is established between them. *Id.*
5. BEST EVIDENCE OF RIGHTS AND DUTIES OF STOCKHOLDERS, in a suit arising under a charter of another state, are the decisions of the courts of that state. *Id.*
6. LEGAL EXISTENCE OF CORPORATION IS ESTABLISHED PRIMA FACIE by proof of the charter of the corporation, and of the exercise of the powers thereby conferred. *Merchants' Bank v. Harrison*, 285.
7. PENNSYLVANIA STATUTE REQUIRING CORPORATIONS TO PAY COUNSEL FEES OF PLAINTIFFS in suits against them, in certain cases, does not apply to a suit to recover the amount of coupons, which is defended on the ground that there had been no presentment. *North Pennsylvania R. R. Co. v. Adams*, 677.
8. INFORMATION IS FATALY DEFECTIVE which charges certain parties with intrusion into the offices of wardens and vestrymen of St. Paul's Church, "a corporation created by the authority of this state," without showing in what manner the organization became a body corporate, not having been created by special charter. *People v. De Mill*, 179.
9. IT IS SUFFICIENT TO AVER IN GENERAL TERMS EXISTENCE OF CORPORATION created by special charter. But where it is not so created, the facts showing its existence must be set forth. *Id.*
10. EXISTENCE OF CORPORATION IS JURISDICTIONAL FACT WHICH MUST BE SET FORTH, unless judicially known, where an information is filed for usurpation of office. *Id.*
11. NATURE AND DUTIES OF ALLEGED OFFICE IN CORPORATION, NOT JUDICIALLY KNOWN, MUST BE SO DESCRIBED, in an information filed for usurpation of the office, as to show whether it is an office within the meaning of the law relating to the usurpation of franchises. *Id.*

COSTS.

1. PROCEEDING TO RETAX COSTS IS NOT SEPARATE SUIT, but is a motion in the cause in which the costs are awarded. *Walton v. Sugg*, 580.
2. SHERIFF'S FEES ARE PART OF COSTS OF SUIT. *Id.*
3. PREVAILING PARTY IS ENTITLED TO HIS COSTS ON APPEAL, although the error for which the judgment below is reversed is merely technical, and his defense seems to be frivolous, and merely for delay. *Mavrich v. Grier*, 373.
4. CITIZEN OF NORTH CAROLINA WHO AUTHORIZES SUIT TO BE BROUGHT IN TEXAS is personally liable for costs adjudged against him, and a judgment therefor may be enforced in North Carolina as a valid foreign judgment. *Walton v. Sugg*, 580.
5. MOTION TO RETAX COSTS WHICH HAVE BEEN MADE OUT BY CLERK is in the nature of an appeal from his decision to the court. *Id.*

CO-TENANCY.

1. **CONDITION IN CONVEYANCE OF LAND IN UNDIVIDED SHARES** to the individual members of an association for the purpose of erecting and managing a hotel, that the land was to be held in common, without partition or division, subject to the articles of the association, is not invalid as repugnant to the estate granted, or upon grounds of public policy; and each of the grantees, and those claiming under them, are estopped to claim partition as against the others. *Hunt v. Wright*, 451.
2. **COVENANT UNDER SEAL BETWEEN TENANTS IN COMMON**, by which they bind themselves, their heirs, executors, or administrators, to bear equally the expenses of any suit by or against the parties to the contract involving the validity of the title to their lands, is a personal covenant, and embraces only such suits and expenses as may be commenced during the lifetime of the contracting parties, and does not include those which may be brought after the decease of such parties, and be prosecuted or defended by their heirs and personal representatives. *Chambers v. Wright*, 311.
3. **POSSESSION OF ONE TENANT IN COMMON IS POSSESSION OF ALL**. Where two are in possession together, and one only is turned out, and the other still remains, his possession is still that of the other also as well as his own. *Bernecker v. Miller*, 309.
4. **CONVEYANCE BY ONE TENANT IN COMMON OF PART OF LAND BY METES AND BOUNDS IS NOT VALID**, as against his co-tenant, unless the assent of the latter to the conveyance is manifested by some proper act. *Bal-lou v. Hale*, 438.
5. **CONVEYANCE BY ONE TENANT IN COMMON OF PART OF LAND BY METES AND BOUNDS ENTITLES GRANTEE TO STAND IN PLACE OF GRANTOR** in respect to the possession and profits of that part; although it can have no effect upon the rights of the co-tenant in respect to partition. *Id.*
6. **TROVER CANNOT BE MAINTAINED BY ONE TENANT IN COMMON AGAINST CO-TENANT** for taking all or any portion of the crops, and merely withholding them, and refusing to allow the former to participate in the use of them. *Id.*

See EXECUTORS AND ADMINISTRATORS, 5; PARTITION.

COUPONS.

- COUPONS BEAR INTEREST FROM MATURITY**, without proof of presentment, in the absence of affirmative evidence showing a readiness to pay at the time and place. *North Pennsylvania R. R. Co. v. Adams*, 677.

CRIMINAL LAW.

1. **ATTEMPT TO COMMIT MISDEMEANOR IS MISDEMEANOR**, whether the offense was created by statute or by the common law. *Smith v. Commonwealth*, 686.
2. **SOLICITATION TO COMMIT OFFENSE IS NOT ATTEMPT**, in a legal sense. *Id.*
3. **ACT WHICH UNEQUIVOCALLY LEADS TO CRIME CAN BE PUNISHED**, either as a consummate crime or as an attempt at crime; but until an overt act is committed, the law will not detect and punish the criminal intent. *Id.*
4. **SOLICITATION OF MARRIED WOMAN TO COMMIT ADULTERY** is not an indictable offense. *Id.*

6. **NEGATING EXCEPTION.** — IN INDICTMENT FOR BIGAMY under a statute making one guilty of that offense who already being married, married another person, except . . . where one of the married persons has been absent for seven years, and the one marrying again did not know the other to be living within that time, if the indictment states that the defendant knew at the time of his second marriage and ever since that his first and lawful wife was living, this cures the omission of the indictment to negative the exception in the statute. *State v. Johnson*, 241.
6. **IF SECOND MARRIAGE CHARGED AS BIGAMOUS WAS CELEBRATED IN ANOTHER STATE** the party cannot be punished for it here; but "continuing to cohabit with such second husband or wife" while the first is living, by the party marrying again, with knowledge that the first husband or wife is living, is polygamy by the law of Minnesota; and on no ground of comity or policy is a state bound to sanction incestuous or polygamous marriages, though valid in another state where they were entered into. *Id.*
7. **EVIDENCE IN PROSECUTIONS FOR BIGAMY.** — On the trial of an indictment for bigamy, an actual marriage or marriage in fact must be clearly proven in both the first and second instances by direct evidence. Indirect or circumstantial evidence, as of cohabitation, repute, conduct of the parties, birth of children, and admissions, is never admissible to establish marriage, or as corroborative of direct evidence of marriage; but it would be admissible so far as it tended to show continued cohabitation under the statute. *Id.*
8. **EX POST FACTO LAW.** — Law is *ex post facto* which alters the legal rules of evidence, and receives less or different testimony than the law required at the time the offense was committed, in order to convict. Consequently where a law was enacted subsequently to the finding of an indictment for bigamy, allowing the marriages to be proved by indirect and circumstantial evidence, instead of direct and positive evidence, it is as to such indictment *ex post facto*. *Id.*
9. **WITNESSES — ASKING WITNESS IF SHE HAD MADE PREVIOUS INCONSISTENT STATEMENTS.** — On trial of indictment for bigamy, where second wife as witness for the state testified that she was not married to the defendant, she may be asked by the state if she had not previously made contrary statements. This is not inconsistent with the rule that a person cannot impeach his own witness. *Id.*
10. **PARTY WHO BY ARTIFICE AND FRAUD PROCURES DOOR OF DWELLING-HOUSE TO BE OPENED** in the night-time, and immediately thereafter enters the house and commits a robbery therein, is guilty of burglary. *Id.*
11. **INDICTMENT FOR LARCENY WILL NOT LIE AGAINST ONE IN POSSESSION OF GOODS** stolen by him in another state. *People v. Loughridge*, 325.
12. **JURY MAY INFER AND FIND EVERY INGREDIENT OF LARCENY FROM EVIDENCE** of the following facts: The owner of a bucket of pease, having taken the same to market for sale, and having occasion to go some distance to inquire the price of pease, set his bucket down in a cart, which he mistook for that of a friend; when the owner of the cart, who was absent when the bucket was placed in it, was about to leave the market, he raised the bucket and asked, "Whose are they?" The defendant took the bucket, whereupon the owner of the cart told him that he must give it to the true owner when he returned. When the owner of the bucket returned, he found his bucket gone, and went after

- the defendant, who had placed beets and lettuce upon the bucket, and was insolent and unwilling to surrender it. *State v. Farrow*, 585.
13. TO CONSTITUTE GOOD INDICTMENT FOR LARCENY, THING STOLEN MUST BE CHARGED TO BE PROPERTY OF ACTUAL OWNER, or of a person having a special property as bailee, and from whose possession it was stolen. *People v. Bennett*, 551.
 14. SUPERINTENDENT OF POOR IS MERE AGENT OF COUNTY; and if goods purchased by him for the support of the poor be stolen, the property may be laid either in the county or in him. *Id.*
 15. LOTTERY AND LOTTERY TICKET. — A scheme called a "prize concert," in which the prizes consist of "gifts in greenbacks," and gifts in other kinds of property, and where "every other ticket draws a prize," and one half of all the tickets represent blanks, constitutes a lottery; and a ticket therein purporting to entitle the holder to a prize drawn by its corresponding number is a lottery ticket. *Commonwealth v. Thacher*, 125.
 16. NO OTHER DESCRIPTIVE AVERMENT OF LOTTERY TICKET IS NECESSARY where it is set forth by copy in the indictment. *Id.*
 17. DEMURRER AND PLEA OF GUILTY ADMIT TRUTH OF ALLEGATIONS IN INDICTMENT that defendant had in his possession with intent to sell, "a certain false and fictitious lottery ticket," or "a ticket in a certain fictitious and pretended lottery," well knowing, etc. *Id.*
 18. OFFICER WHO ARRESTS PERSON FOR COMMISSION OF CRIME MAY SEARCH HIM to ascertain if deadly weapons, money, or articles of value are on his person or in his possession, by means of which the prisoner might commit violence or effect his escape, and if found, may seize and hold them until the prisoner is discharged, or until they are otherwise properly disposed of; and the officer will not be liable therefor, if he acts in good faith, and from a due regard to the safety of himself or of the public, or the security of the prisoner. *Closson v. Morrison*, 459.
 19. IT IS QUESTION OF FACT FOR JURY WHETHER OFFICER TAKING PROPERTY FROM PRISONER, arrested for the commission of a crime, acted *bona fide* and for a proper purpose, or *mala fide* and for an improper purpose. *Id.*
 20. OMISSIONS IN INDICTMENT WHICH ARE IN COMMON UNDERSTANDING IMPLIED in that which is expressed will not render the indictment invalid. *People v. Bennett*, 551.
 21. CAPTION OF INDICTMENT IS NO PART THEREOF. *Id.*
 22. GRAND JURORS NEED NOT BE NAMED IN INDICTMENT; the proper place to name them is in the caption of the indictment. *Id.*

See JURY AND JURORS.

CUSTOMS.

CUSTOM TO BE ADMITTED INTO LAW must appear to have been general and uniform, peaceably acquiesced in, and not subject to contention and dispute. *Strong v. Grand Trunk R. R. Co.*, 184.

See COMMON CARRIERS, 29; USAGES.

DAMAGES.

1. VERDICT FOR FOUR HUNDRED DOLLARS FOR THREE MONTHS' BREACH OF AGREEMENT NOT TO ENGAGE IN CERTAIN KIND OF BUSINESS FOR FIVE YEARS will not be set aside as unwarranted by law and excessive, where the injury to the plaintiff, as by diverting his trade, was not capable of

exact proof or definite computation, but depended very much on general estimate, which was peculiarly within the province of the jury; and no exception lies to the exercise of the discretion of the presiding judge in overruling a motion to set aside the verdict as unwarranted by law upon the evidence, especially where no instruction was asked at the trial on the limit of damages which the jury would be warranted in finding upon the evidence. *Doyle v. Dixon*, 80.

7. **OBVIOUS PURPOSE OF PLEADER TO ALLEGE SPECIAL DAMAGES WILL NOT BE CONTROLLED** by the mere fact that he commenced the allegations as though they were new counts. *Burnside v. Grand Trunk R'y Co.*, 474.
 8. **OBJECTION THAT SPECIAL DAMAGES SHOULD NOT HAVE BEEN CONSIDERED BY JURY**, even if properly alleged, cannot be urged on a motion for a new trial if the party's exception as to the admission of evidence of special damages was solely on the ground that they were not alleged in the declaration, and no instructions on the point were asked. *Id.*
 4. **MOTION TO SET ASIDE VERDICT FOR EXCESSIVE DAMAGES, AND AS CONTRARY TO WEIGHT OF EVIDENCE, IS ADDRESSED TO DISCRETION OF JUDGE.** When the damages appear to him to be excessive, he may either grant a new trial absolutely, or give the plaintiff the option to remit the excess or a portion thereof and order the verdict to stand for the residue, and no exception lies to his action. *Doyle v. Dixon*, 80.
- See **LANDLORD AND TENANT**, 7; **NUISANCE**, 1, 5; **REPLEVIN**, 5, 6; **TELEGRAPHS**, 2, 5.

DEBTOR AND CREDITOR.

AGREEMENT TO DISCHARGE DEBTOR ON RECEIVING CERTAIN NOTE WITHIN CERTAIN TIME IS TO BE REGARDED AS TAKING EFFECT upon the delivery of the note, and not as a promise to give a discharge at a future time. *Hibbard v. Eastman*, 467.

DEEDS.

1. **DEPOSIT OF DEED WITH THIRD PERSON IS NOT GOOD DELIVERY TO GRANTEE**, if the grantor continues till his death to have the right to recall the deed, and no such arrangement has been entered into between the depository and the grantee as to create a privity between them, although the grantor may never have recalled it. *Baker v. Haskell*, 455.
2. **ACKNOWLEDGMENT IS SUFFICIENT TO RENDER DEED ADMISSIBLE IN EVIDENCE**, where notary, in his certificate to a deed conveying land in Livingston County, describes himself as a notary public within and for the county of Livingston, though he appends to his signature the words "Notary Public Howard County." *Merchants' Bank v. Harrison*, 285.
3. **DEED TAKEN AS SECURITY FOR MONEY LOANED IS BUT MORTGAGE**, and cannot by any form of words, or other means, be converted into an absolute conveyance. *Houser v. Lamont*, 755.
4. **FOR FRAUD IN ITS FACTUM, DEED MAY BE AVOIDED AT LAW**; but for fraud in the consideration of it, or in some matter collateral to it, relief can be had only in a court of equity. *McArthur v. Johnson*, 593.
5. **WHERE ONE PROPOSES TO CONVEY TRACT OF LAND**, and his brother undertakes to have the deed drawn, but without the knowledge of the grantor inserts therein a conveyance of another tract in trust for himself, and assures the vendor that it is "all right," whereupon the latter executes it without reading it or hearing it read, the conveyance of such second tract will be valid at law. *Id.*

6. INCORPOREAL HEREDITAMENT, AND NOT EXCLUSIVE RIGHT TO ALL COAL, AND TO ANY EXTENT, IS GRANTED by a deed to a certain person, his heirs, executors, administrators, and assigns forever, of "the free right to dig coal at the coal-bed, under the foot of the mountain, on my lot, with the privilege freely to carry the coal to and from said coal-bed through my lands at all times hereafter, doing as little damage as may be in the uses aforesaid." *Gloninger v. Franklin Coal Co.*, 720.

See INFANCY; POWERS.

DEPOSITIONS.

See EVIDENCE, 9.

EASEMENTS.

- IT IS ESSENTIAL TO EASEMENT that there should be both a dominant and a servient tenement. *Dark v. Johnston*, 732.

EJECTMENT.

1. GRANT OF OIL WHICH MAY BE FOUND IN TRACT OF LAND IS NOT GRANT OF CORPOREAL HEREDITAMENT, for which ejectment will lie. *Id.*
2. JUDGMENT IN EJECTMENT IN FAVOR OF VENDOR AGAINST VENDEE, under which the land is delivered to the vendor, puts an end to the equity of a purchaser at a subsequent sheriff's sale of the vendee's equitable interest, under a judgment previously obtained, although the vendee suggested to the vendor to proceed against him for the purchase-money, which the vendor did, knowing that there were judgments against the vendee, and accordingly obtained the conditional judgment in ejectment by confession. *Damon v. Bache*, 730.
3. IF BOTH PARTIES IN EJECTMENT CLAIM UNDER COMMON TITLE, it is *prima facie* sufficient to show a derivative title from the common grantor without proving his title. *Merchants' Bank v. Harrison*, 285.

EMINENT DOMAIN.

1. RIGHT OF COMMONWEALTH TO TAKE PRIVATE PROPERTY OR AUTHORIZE IT TO BE TAKEN without the owner's assent, on compensation made, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose. *Lance's Appeal*, 792.
2. PRIVATE PROPERTY TAKEN FOR PUBLIC USE MUST BE HELD in accordance with and for the purposes which justified its taking. *Id.*
3. EXERCISE OF RIGHT OF EMINENT DOMAIN IS IN DEROGATION OF PRIVATE RIGHT, and the authority must be strictly construed. What is not granted is not to be exercised. *Id.*
4. RAILROAD COMPANY IS NOT AUTHORIZED TO USE RIGHT OF WAY taken under the right of eminent domain for any other independent purpose than that for which it is taken. *Id.*
5. PLAN IN ACCORDANCE WITH WHICH RIGHT OF WAY FOR RAILROAD ACROSS PRIVATE LAND WAS CONDEMNED CANNOT BE CHANGED at the pleasure of the promoter. *Id.*

EQUITY.

1. WHERE BILL IS FILED FOR DISCOVERY AND RELIEF, DEFENDANT CANNOT DEMUR TO DISCOVERY ONLY, except where the discovery would subject him to a penalty, or it is immaterial or impertinent, or involves a breach
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of confidence which the law holds inviolate, or appertains exclusively to the defendant's title. *Wistar v. McManes*, 700.

2. IN BILL FOR DISCOVERY AND RELIEF, DENIAL of the discovery is no ground for dismissing the bill. The plaintiff may make out his case without discovery. *Id.*
3. DENIAL OF DEFENDANT'S APPLICATION TO OPEN JUDGMENTS ENTERED ON WARRANTS OF ATTORNEY, and let him in to defend on the ground of usury, is not such an adjudication as bars a resort to equity for relief. *Id.*
4. DENIAL OF RELIEF BECAUSE OF PRIOR ADJUDICATION AT LAW IS LIMITED, to cases where the party had a trial, or an opportunity of a trial, in which he might have availed himself of his equities. *Id.*
5. SUMMARY DETERMINATION OF QUESTION RAISED BY MOTION IN COURT OF LAW is not a bar to a bill in equity, if it be an equitable question, though it be decided there is no equity. *Id.*
6. EQUITY WILL INTERFERE TO PREVENT CLOUD FROM BEING CAST UPON TITLE upon the same principle that it will remove a cloud from title. *Tucker v. Kenniston*, 425.
7. PURCHASER OF LAND AT SALE MADE UNDER DECREE IN EQUITY, who has paid nothing under his purchase, and has notice of an equitable title in the complainant, cannot set up his title against complainant's equity, but is entitled by motion in the cause under an order in which he purchased to have his bond for the purchase-money canceled. *Cohn v. Chapman*, 600.
8. EQUITY WILL ENFORCE TRUST OR CONTRACT, but cannot create a title where none exists. *Rush v. Vought*, 769.
9. CREDITORS CAN WORK OUT EQUITIES ONLY THROUGH RIGHTS OF PARTIES, where there is no fraud. *Id.*
10. DEBTOR CANNOT BE COMPELLED TO LABOR FOR HIS CREDITORS, nor have they a remedy against his personal efforts. *Id.*

See CONTRACTS; GUARDIAN AND WARD, 3; INSURANCE, 10; JUDGMENTS, 6, 7; PARTITION; SPECIFIC PERFORMANCE.

ESTATES.

1. WHEN ESTATE IN LAND HAS BEEN FORFEITED by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent period; and when a covenant has been broken already, the acceptance of performance of a new agreement substituted in place of it will have the same effect. *Garnhart v. Finney*, 303.
2. MERE BREACH OF CONDITION WILL NOT REVEST ESTATE IN GRANTOR UPON CONDITION EXCEPT AT HIS ELECTION. It is optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same, as a forfeiture of the estate thus granted. *Hubbard v. Hubbard*, 75.
3. TO MAKE ESTATE ON CONDITION REVEST IN GRANTOR UPON BREACH OF CONDITION, he, if not in possession, must make entry or bring action; or if in possession, he must manifest intent to hold possession by reason of the breach. *Id.*
4. GRANTOR OF ESTATE UPON CONDITION MAY WAIVE BREACH AND FORFEITURE. *Id.*
5. WAIVER OF BREACH OF CONDITION OF ESTATE UPON CONDITION, WHAT CONSTITUTES. — If the grantor of an estate on condition, after breach of condition, but before entry, action, or manifestation of intent to hold possession by reason thereof, treats the condition as still subsisting and obligatory, it is a sufficient waiver of the breach. *Id.*

6. **WAIVER OF BREACH OF CONDITION SUFFICIENT TO AVOID FORFEITURE OF ESTATE UPON CONDITION.** — A conveyed premises to B on condition that A and his wife should be allowed to reside thereon during their respective lives, and that so long as they should so reside, B should furnish them with comfortable maintenance and support. This condition was broken, and A waived the breach both as to himself and as to his wife. *Held*, that this waiver was sufficient to avoid forfeiture without any waiver by the wife also, although the wife joined in the deed from A to B for the purpose of releasing her right of dower and homestead rights, if any, in the premises conveyed. *Id.*

ESTATES OF DECEDENTS.

1. **PROCEEDING IN PROBATE IS IN ITS NATURE DISTINCT FROM ACTION AT LAW** or a suit in equity, notwithstanding the fact that the same court has jurisdiction in common law, chancery, and probate cases. *Lucich v. Medin*, 376.
2. **ERROR IN NAMES OF PARTIES TO PETITION IN PROBATE PROCEEDINGS** may be corrected by an amendment. And where a petition is irregularly presented by the attorneys of the legatees in their own name instead of the name of the legatees, this error may be corrected by substituting the names of the legatees for those of the attorneys. *Id.*
3. **UPON DEATH OF ANCESTOR, HIS LAND PASSES TO HIS HEIRS or devisees.** His personal representative takes no interest in it beyond a naked power to sell for the payment of debts, and the possession as well as the defense of the title belongs exclusively to the heirs or devisees. *Chambers v. Wright*, 311.
4. **DEBTS OF DECEDENT ARE TO BE PAID FROM HIS PERSONAL ESTATE**, unless that be exhausted, whereupon the real estate may be applied for that purpose under an order of the court, obtained upon a showing of the facts. *Russell v. Russell*, 540.
5. **REAL ESTATE OF DECEASED PERSON** is liable for the payment of his debts, subject to the widow's dower, and his heirs to whom it descends take *cum onere*; whoever buys from them does so subject to the application of the rule of *caveat emptor*. *Faran v. Robinson*, 617.
6. **SETTLEMENT OF ACCOUNT IN PROBATE PROCEEDINGS IS ONLY RES JUDICATA** as to those matters actually embraced in the account; and where a mistake appears in a former settlement, it may be corrected in a subsequent one. *Lucich v. Medin*, 376.
7. **PROBATE COURT MAY CORRECT ITS OWN ERRORS IN SETTLEMENT OF ACCOUNTS** at any time before final settlement, provided the correction can be made from the face of the record without opening the proof as to the accounts allowed. But if the mistake or error is only to be shown by going anew into the proof, the account cannot be reopened. *Id.*

ESTOPPEL.

1. **RULE THAT TENANT OR VENDEE IN POSSESSION CANNOT DENY TITLE** under which he entered is confined to the title of the landlord or vendor at the time possession is given. *McAusland v. Pundt*, 358.
2. **TENANT OR VENDEE IN POSSESSION IS NOT ESTOPPED FROM SHOWING** that title of lessor or vendor has passed from him by his own conveyance, or by sale under judgment against him; and may acquire good title from the grantee or purchaser under the judgment. *Id.*

EVIDENCE.

1. COURTS TAKE JUDICIAL NOTICE OF MATTERS OF PUBLIC HISTORY affecting the whole people, such as the existence of a civil war and the particular acts that led to it; and the court in ascertaining such matters may resort to such documents of reference as may be at hand, and as may be worthy of confidence. *Swinerton v. Columbian I. Co.*, 560.
 2. DECLARATIONS OF ANCESTOR ARE ADMISSIBLE against those claiming as his heirs at law. *Baker v. Haskell*, 455.
 3. DECLARATIONS OF GRANTOR, SUBSEQUENT TO GRANT, ARE NOT ADMISSIBLE against his grantee. *Id.*
 4. INSTRUCTION CHARGING WITHOUT QUALIFICATION THAT DECLARATIONS AND ADMISSIONS of a party are not evidence in his favor is erroneous. *Baker v. Kelly*, 274.
 5. DECLARATIONS OF PARTY ARE ADMISSIBLE AS EVIDENCE IN HIS FAVOR when part of the *res gestæ*, or where such declarations are necessary to explain an act which takes its character from the design and intention of the party who does it. *Id.*
 6. EVIDENCE OF HIS ACTS AND DECLARATIONS MADE ANTE LITEM MOTAM, and at a time when he could have no reasonable motive to misstate facts, are admissible where the intentions of a party are sought to be established to show what his intentions were. *Id.*
 7. ACTS AND DECLARATIONS OF DEFENDANT MADE BEFORE SUING OUT ATTACHMENT are admissible as evidence in his favor, on the trial on an issue as to whether or not the defendant was about to remove out of the state. *Id.*
 8. CERTIFICATE OF COMMISSIONER TO DEPOSITION WHICH STATES THAT WITNESSES "were duly sworn true answers to make to the interrogatories and cross-interrogatories," is a substantial compliance with the requirements of the Mississippi statute. *Id.*
 9. CLERK DOES RIGHT IN PASSING UPON AND ALLOWING DEPOSITION TO BE READ, where he finds it among the papers, with a commission unattached, and an envelope appearing to have been sealed up and afterwards broken open. *Hill v. Bell*, 583.
- See AGENCY, 8-10; BANKS AND BANKING, 8, 9; CRIMINAL LAW, 7; GROWING CROPS; LUNACY; NEGLIGENCE; PLEADING AND PRACTICE; TELEGRAPHS, 3; WILLS; WITNESSES.

EXECUTIONS.

1. EXECUTION CREDITOR CANNOT TAKE GOODS OUT OF PAWNEE'S POSSESSION without tendering him the money for which he holds them in pledge. *Baugh v. Kirkpatrick*, 675.
2. DEFENDANT MAY WAIVE RIGHT TO HAVE HIS PERSONAL ESTATE LEVIED UPON before his real estate, and an attempted fraudulent conveyance of all his property by him amounts to such a waiver. *Stancill v. Branch*, 592.
3. SHERIFF WHO LEVIES EXECUTION UPON REAL ESTATE MERELY BY INDORSING LEVY upon his writ, and subsequently turns over the writ, with his other unexecuted process, to his successor in office, cannot afterwards proceed to sell and convey the lands of the defendant, and his deed will not convey title. *Merchants' Bank v. Harrison*, 285.
4. RECITALS IN SHERIFF'S DEED CONVEYING LANDS OF JUDGMENT DEBTOR are sufficient evidence of the existence of the judgment without production of the judgment record. *Id.*

5. NO ONE EXCEPT DEFENDANT HIMSELF HAS RIGHT TO HAVE EXECUTION SET ASIDE which has been issued before the date to which it has been postponed by an order of record. It will not be set aside at the instance of the defendant's trustee. *Shelton v. Fels*, 586.
6. DEBTOR'S EQUITY OF REDEMPTION, OR ANY OTHER INTEREST IN HOMESTEAD, CANNOT LAWFULLY BE SOLD ON EXECUTION under the New Hampshire statute, if the homestead does not exceed the statutory exemption in value; and if it exceeds that sum, the officer about to levy must, upon due application, set out the homestead before he can make sale of any interest therein, and then can proceed only against the surplus. *Tucker v. Kenniston*, 425.
7. RULE THAT PURCHASER AT SHERIFF'S SALE BECOMES POSSESSED OF TITLE and interest of judgment debtor at the time of the entry of judgment is subject in equity to the qualification that he takes the title subject to the equities then existing against the judgment debtor, or which have since arisen through want of knowledge of the judgment. *Filley v. Duncan*, 337.

See ATTACHMENT; TENDER.

EXECUTORS AND ADMINISTRATORS.

1. WIFE WHO LEAVES HER HUSBAND, AND RENOUNCES ALL CONJUGAL INTERCOURSE WITH HIM for a considerable time prior to his death, is not entitled to administer his estate, nor is she in a position to object that administration was granted to one out of the state. *Odiorne's Appeal*, 683.
2. STATUTES ENTITLING WIFE TO ADMINISTER ESTATE OF HUSBAND, AND TO RECEIVE THREE HUNDRED DOLLARS THEREFROM, CONTEMPLATE only the case of a wife who lives with her husband till his death, and faithfully performs all her duties to his family. *Id.*
3. PAYMENT TO ADMINISTRATOR OF DECEASED ADMINISTRATOR IS INVALID. *Stair v. New York Banking Co.*, 759.
4. EXECUTOR HAS NO POWER TO COMPROMISE SUIT PENDING AGAINST ESTATE of his testator without the consent of the probate court. *Lucich v. Medin*, 376.
5. WHEN PARTY WHO IS CO-TENANT OF HIS TESTATOR PAYS MONEY TO COMPROMISE SUIT affecting the common property, without seeking the advice of the probate court, he will be held to have paid it as co-tenant, and not as executor. *Id.*
6. EXECUTOR HAS NO RIGHT TO BORROW MONEY FOR ESTATE of his testator, unless expressly authorized by the will. *Id.*
7. EXECUTOR HAVING MINING STOCK LIABLE TO ASSESSMENT SHOULD OBTAIN ORDER OF COURT TO SELL IT, or if the estate be surely solvent, turn it over to the legatees; but he has no right to borrow money to pay the assessments. *Id.*
8. POWER VESTED IN EXECUTRIX TO SELL REALTY "AS SHE SHALL DEEM EXPEDIENT, for the best interests of the legatees," etc., is a general power in trust in which she has no interest. *Russell v. Russell*, 540.
9. POWER VESTED IN EXECUTRIX TO SELL "AS SHE MAY DEEM MOST EXPEDIENT, and for the best interests of the legatees," etc., is not well executed by the conveyance to one of the legatees of a portion of the real estate of the testator, in payment of a debt due from the testator to the legatee. *Id.*
10. SALES BY EXECUTOR OR ADMINISTRATOR ARE VOID IF MADE WITHOUT ORDER OF COURT, or in any manner not authorized by law; and prop-

- erty so sold may be recovered by the distributees or legatees from the parties holding it under the sale. *Ware v. Houghton*, 258.
11. **WARRANTY OF TITLE IS NOT IMPLIED IN SALES BY EXECUTORS, ADMINISTRATORS, OR TRUSTEES;** the maxim *caveat emptor* applies both in regard to title and to soundness or quality. *Id.*
 12. **PURCHASER OF PERSONAL PROPERTY FROM EXECUTOR OR ADMINISTRATOR,** at a sale under a void order of the probate court, may, as a defense against the payment of the purchase-money, show a previous eviction, or a return or offer to return the property within a reasonable time after discovering the defect in the title, thereby rescinding the contract of sale. *Id.*
 13. **ADMINISTRATOR WHO HAS MADE SUPPOSED FINAL SETTLEMENT,** and exhausted the personal assets in the payment of debts due from the estate and the statutory allowance to the widow, and who, as administrator, afterwards unsuccessfully defends a suit brought against him for a debt due from his intestate, is entitled to an order to sell so much of the real estate of the decedent as may be necessary to pay the judgment and costs thus recovered against him, notwithstanding the fact that the intestate's real estate has been partitioned among the heirs, and by them conveyed to third parties. *Faran v. Robinson*, 617.
 14. **IN COLLATERAL PROCEEDING, JUDGMENT OBTAINED AGAINST ADMINISTRATOR** is conclusive evidence of the indebtedness adjudged by it, unless impeached for fraud or mistake, or perhaps for culpable negligence of the administrator in the defense of the action in which it was obtained. It cannot be impeached for error. *Id.*
 15. **ESTATE OF INTESTATE IS PRIMARILY LIABLE TO PAY JUDGMENT** obtained against the administrator, and if his sureties are compelled to pay it in the first instance, they are entitled to be subrogated to the rights of the judgment creditor, and to enforce the judgment against the estate. *Id.*
 16. **WASTE, NEGLIGENCE, AND MISMANAGEMENT ARE AS GOOD GROUNDS FOR REMOVING EXECUTOR** as actual fraud or embezzlement. *Lucich v. Medin*, 376.
 17. **EXECUTOR WHO FAILS TO DO WHAT IS NECESSARY TO PROTECT ESTATE** should be removed, although he may have abstained from doing anything actually wrong. *Id.*
 18. **EXECUTOR MAY EMPLOY COUNSEL TO DEFEND INTERESTS OF ESTATE,** when it is involved in litigation. But he has no right to employ counsel at the expense of the estate to do what he himself should do, and for the doing of which he is compensated by his commissions. *Id.*

See **BANKS AND BANKING**, 6, 7.

EXEMPTIONS.

LANGUAGE OF EXEMPTION ACT SHOULD BE CONSTRUED in harmony with its humane and remedial purpose. *Stewart v. Brown*, 578.

See **PARTNERSHIP**, 10.

EX POST FACTO LAWS.

See **CRIMINAL LAW**, 8.

FACTORS.

FACTOR WHO HAS MADE ADVANCES TO HIS CONSIGNOR MAY PROCEED TO SELL, notwithstanding the service of an attachment, sued out by a cred-

itor of the consignor. The attaching creditor cannot arrest a sale without tendering to the factor the amount of his advances. *Baugh v. Kirkpatrick*, 675.

FIXTURES.

1. LAMPS, CHANDELIERS, CANDLESTICKS, CANDELABRA, SCONCES, GAS-FIXTURES, and the various contrivances for lighting houses by means of candles, oil, other fluids, or gas, are not fixtures, form no part of the realty, and do not pass under a sale thereof. *Rogers v. Crow*, 299.
2. CHURCH ORGAN IS FIXTURE, AND PASSES TO GRANTEE, where in the building of the church a space or recess was left to be exclusively appropriated to the reception of the organ, and that part of the building was left incomplete, and never finished until the organ was put into position, which was necessary to give to that part of the house architectural perfection and symmetry, and to make it conform to the intention and uses in view when it was erected. *Id.*

FORFEITURES.

FORFEITURES ARE NOT FAVORED IN LAW, and when once waived will not be assisted by the court. *Garnhart v. Finney*, 303.

See ESTATES, 1, 2, 4, 6; LANDLORD AND TENANT, 2-7.

FRAUD.

1. TO SHOW FRAUDULENT INTENT WITH WHICH REPRESENTATIONS WERE MADE, evidence of other fraudulent representations of a similar character, made by the same person, and about the same time, is admissible. *Perkins v. Prout*, 449.
2. NO WRONG CAN BE COMMITTED WHERE ONE PURSUES HIS LEGAL RIGHTS BY LAWFUL MEANS. If he gets ahead of others who had an equal chance with him, the law finds no fault. *Damon v. Bache*, 730.

See CONTRACTS, 5-8; DEEDS, 4; SALES, 3-4.

FRAUDULENT CONVEYANCES.

See EXECUTIONS, 2.

GIFTS.

- TITLE TO CHOSSES IN ACTION, SUCH AS NOTES NOT INDORSED, money, and certificates representing money, may pass by delivery only, as gifts *coram mortuis*. *Westerlo v. De Witt*, 517.

GROWING CROPS.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT CROP OF CORN GROWING UPON LAND at the time the land was conveyed did not pass by the deed, but was reserved by the grantor. There is a distinction in this respect between *fructus industriales* and fruit upon trees, etc., which are the spontaneous products of the earth, or its permanent fruits. *Flynt v. Conrad*, 588.

See CO-TENANCY, 6; REALTY.

GUARDIAN AND WARD.

1. RIGHTS OF WARD ARE TO BE ASSERTED IN HIS OWN NAME; but upon the appointment of a guardian, all discretion as to their exercise is taken from the ward, and thenceforward intrusted to the guardian. *Ohandler v. Simmons*, 117.

2. **GUARDIAN AD LITEM MUST PROTECT RIGHTS OF HIS WARD**, and it is his special duty to ascertain and bring these rights directly under the consideration of the court for decision, for the court will not suffer the ward to be prejudiced either by the admissions or laches of the guardian. *Long v. Mulford*, 638.
3. **EQUITY WILL NOT PERMIT GUARDIAN**, or other person standing in a fiduciary relation, or who, from the relation in which he stands to another, is capable of exercising an undue influence over his mind, to derive profit from any transaction which takes place during the continuance of such relation. *Id.*
4. **GUARDIAN OF ADULT MAY AVOID ANY CONVEYANCE OF PROPERTY EXECUTED BY HIS WARD** while a minor, which might be avoided by the ward himself if capable of exercising the right; or where, after he is of full age, he is unable to exercise his privilege by reason of mental or legal incapacity. *Chandler v. Simmons*, 117.
5. **DEED OBTAINED BY UNDUE INFLUENCE, THOUGH VOIDABLE ONLY BY PARTY WRONGED, MAY BE AVOIDED** by a guardian afterwards appointed.

See SPENDTHRIFT.

HIGHWAYS.

LIABILITY OF TOWN FOR INJURY CAUSED BY UNCONTROLLABLE HORSE COMING UPON DEFECT IN HIGHWAY. — Where a horse, which being driven with due care upon a highway which a town is bound to keep in repair, becomes, by reason of fright, disease, or viciousness, actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, as upon a place defective for want of a railing, and by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable if he merely shies or starts, or is momentarily not controlled by his driver. *Titus v. Inhabitants of Northbridge*, 91.

See WAX.

HOMESTEADS.

See ATTACHMENT, 1; EXECUTIONS, 6.

HUSBAND AND WIFE.

HUSBAND DOES NOT ACQUIRE TITLE TO PRODUCTS OF WIFE'S FARM merely, by the labor which he voluntarily bestows upon it, where he is permitted in the enjoyment of the marital relation to live and be maintained upon the farm which the wife manages for her own use. *Rush v. Vought*, 769.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

INDICTMENTS.

See CRIMINAL LAW.

INFANCY.

1. **MINOR IS COMPETENT TO CONTRACT FOR HIS OWN BENEFIT**, but his contracting power is limited to his necessities and advantages, and his contracts cannot inure to the benefit of another. *Fairmount Co. v. Stutler*, 714.

2. MINOR IS DEPRIVED OF HIS RIGHT TO AVOID HIS CONTRACT, if after becoming of age he retains and uses or disposes of property acquired under it. Such act is an affirmance of the contract by which he acquired it. *Chandler v. Simmons*, 112.
3. IF MONEY PAID TO MINOR AS CONSIDERATION FOR HIS CONVEYANCE OF REAL ESTATE HAS BEEN WASTED or spent by him during his minority, payment or tender of the amount is not necessary to enable him, or if he is under guardianship, his guardian, to avoid the conveyance. *Id.*
4. MINOR HIMSELF CANNOT AFFIRM HIS DEED UNTIL HE IS OF AGE. *Id.*
5. MINOR MAY AVOID HIS DEED WITHOUT RETURN OF CONSIDERATION; but he must make his contract wholly void, if at all, so that it will no longer protect him in the retention of the consideration. His act of avoidance will divest him of all right to retain any part of the fruits of the contract he may have on hand, and the other party may reclaim it. *Id.*
6. DECREE AGAINST INFANT MAY BE SET ASIDE where fraud or surprise is practiced in obtaining it. *Long v. Mulford*, 638.
7. JURISDICTION OF EQUITY TO PROTECT INFANTS is not confined to strictly fiduciary relations. It may give relief in all cases where influence is acquired and abused, and confidence reposed and betrayed. *Id.*
8. ABSOLUTE DECREE CANNOT BE RENDERED AGAINST INFANT without notification and a day allowed him in court, after coming of age, within which to show cause against it. *Id.*
9. DECREE AGAINST INFANT MAY BE IMPEACHED for error by original bill, and what would have been good cause of action to sustain the bill will be good cause of action under the code. *Id.*
10. WHERE DECREE AGAINST INFANT and deeds thereunder have been obtained through fraud, and the infant is not guilty of laches, the statute of limitations will not begin to run against him until the discovery of the fraud; and the burden of showing such knowledge as will set the statute in operation rests on the other party. *Id.*

See COMMON CARRIERS. 42, 43; GUARDIAN AND WARD; PARENT AND CHILD.

INSANITY.

See LUNACY; WILLS.

INSOLVENCY.

PRIOR ASSIGNMENT UNDER INSOLVENT LAW OF ONE STATE WILL NOT BE PERMITTED TO PREVAIL against a subsequent attachment of personal property found in another state, by a citizen thereof. *Dunlap v. Rogers*, 433.

INSURANCE.

1. POLICY OF INSURANCE UPON BUILDING AND STOCK OF GOODS, SUCH AS IS USUALLY KEPT in a country store, covers all articles of merchandise coming within such description, though it would include articles which will not ordinarily be insured except at special rates. *Pindar v. Kings Co. Ins. Co.*, 544.
2. WHERE POLICY OF INSURANCE CONTAINS CONDITION that it shall become void if the property "shall be sold or conveyed," and it is taken upon mortgaged property, after which it is assigned to, and the property delivered to, the mortgagee, with the assent of the company, such transfer of the possession and control of the property is not, of itself, such sale and conveyance as will invalidate the policy. *Washington Ins. Co. v. Hayes*, 628.

3. **WHERE POLICY OF INSURANCE CONTAINS CONDITION** "that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein, this policy shall be null and void," and the stock of goods insured is removed to and merged in another stock, which is insured under policies covering accruing stock, the insurance on the latter will cover the former; and if effected without the consent of the first insurer, the policy issued by him is void. *Id.*
4. **FOLLOWING CLAUSE IN MARGIN OF POLICY OF MARINE INSURANCE ON VESSEL CONTROLS** the usual terms of a printed policy: "Warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat." And a capture by authority of the Confederate States during the Rebellion is within the warranty, and relieves the insurer from responsibility. *Swinerton v. Columbian Ins. Co.*, 560.
5. **POLICY OF FIRE INSURANCE CONTAINING CONDITION**, "that if the interest in the property to be insured be a leasehold, trustee, mortgagee, or reversionary interest, or other interest not absolute, it must be represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void," is not avoided where the insured represents himself as owner, and at the time bases his title on a certificate of purchase at foreclosure sale under the laws of a state allowing fifteen months for redemption, and it is shown that after the loss occurred he received his final deed conveying the property in fee, no redemption having taken place. In such case the deed is to be considered as relating to the date of the sale and certificate, and as vesting the full legal title in the insured at a date anterior to that of the policy. He is to be regarded as absolute owner at that date and at the time of the loss. *Gaylord v. Lamar F. Ins. Co.*, 289.
6. **BURDEN IS UPON INSURANCE COMPANY TO PROVE NON-PAYMENT OF PREMIUM NOTE**, in order to avoid a policy of insurance made and accepted on condition that it should cease and determine upon failure by the assured to pay when due a premium note given by him to the insurers. *Hoydon v. Guardian L. I. Co.*, 73.
7. **WAIVER BY INSURANCE COMPANY OF CONDITION RESPECTING PAYMENT OF PREMIUM NOTE.** — Where the agent of an insurance company receives payment when overdue of a premium note given to his principals by the assured, upon a policy of insurance issued by them and made and accepted on condition that it should cease and determine upon failure by the assured to pay the note when due, and accounts for such payment to his principals, and they receive it without inquiry, they thereby waive the right to avail themselves of the delay of payment in order to avoid the policy, although the agent had no authority to waive forfeitures. *Id.*
8. **WAIVER OF CONDITION IN POLICY OF INSURANCE.** — Where policy of insurance provides that it shall be void in case of any other insurance not mentioned in or indorsed upon the policy, or in case of any subsequent insurance without notice to the insurer indorsed upon the policy, or the notice acknowledged in writing, such condition may be waived by the company as well by acts as by positive declarations; and the company may be estopped by a course of dealing, or open actions, inducing the insured to act to his detriment. *Howitz v. Equitable M. I. Co.*, 321.
9. **INSURANCE COMPANY IS BOUND BY ACTS OF LOCAL AGENT** within the scope of his authority. Thus where the agent issues a policy containing a

condition that it shall become void in case additional insurance is taken without notice to the company indorsed on the policy, or otherwise acknowledged by them in writing, but expressly agrees with the insured to obtain, and does obtain, additional insurance, after which, with a full knowledge of the facts, the company receives the premium, they will be deemed to have waived the condition in the policy. *Id.*

10. **EQUITY MAY REFORM POLICY OF INSURANCE** or other written contract upon parol evidence, when the contract really made by both parties has not been correctly incorporated into the instrument through accident or mistake in framing it; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be. The court cannot supply an agreement that was never made. *Tesson v. Atlantic Mut. Ins. Co.*, 293.
11. **WHEN THERE IS SUCH VARIANCE IN DESCRIPTION OF PROPERTY** in a policy of insurance as amounts to a breach of warranty in any material respect, the result is that the policy is void; and it is not enough that an agent intended to effect an insurance on the property by whatever description might be correct. *Id.*
12. **WHETHER THERE IS SUCH VARIANCE BETWEEN DESCRIPTION** of the subject insured as contained in the policy and the actual buildings as shown by the evidence, or whether there is a misrepresentation of any material fact, or breach of the warranty created by embodying the representations made in the policy, such as would preclude a recovery on the policy, are questions of fact to be determined by a jury. *Id.*
13. **CONTRACT OF INSURANCE IS TO BE CONSTRUED** with reference to the subject-matter, and with a view to the object and intention of the parties as the same may be gathered from the instrument; and parol evidence is admissible, not to contradict or change the terms of the instrument, but to develop and explain its true meaning. *Id.*
14. **CONSTRUCTION OF LANGUAGE IN POLICY OF INSURANCE** is to be determined, as in other contracts, by usage and common acceptation; and the stipulations, though being of the character of warranties and conditions, are to be reasonably construed with reference to the whole subject-matter, and not captiously or literally. Parol evidence is admissible for this purpose, and the question is one for the jury to determine. *Id.*

INTEREST.

See COUPONS; USURY.

INTERPLEADER.

CLAIMANT IN SHERIFF'S INTERPLEADER IS NOT OBLIGED TO ESTABLISH TITLE TO EVERY ITEM in the sheriff's levy in order to have a verdict in his favor. *Rush v. Vought*, 769.

JUDGMENTS.

1. **NO LIEN UNDER JUDGMENT ATTACHES TO AFTER-ACQUIRED LANDS** so as to affect *bona fide* purchasers, until levy of execution. *Filley v. Duncan*, 337.
2. **LIEN OF JUDGMENT IS SUBJECT TO ALL EQUITIES** that exist at the time of its recovery. *Id.*
3. **GRANTEE OF JUDGMENT CREDITOR WHO PURCHASES DEBTOR'S LAND AT SALE** under his judgment acquires a good title, notwithstanding the judgment is afterwards reversed. *McAusland v. Pundt*, 358.

4. JUDGMENT CREDITOR WHO PURCHASES DEBTOR'S LAND AT SALE UNDER HIS JUDGMENT acquires a title no more affected by a reversal of the judgment than if he had been a stranger. *Per Crounse, J. Id.*
5. WHERE JUDGMENT OF CINCINNATI SUPERIOR COURT at special term is reversed at general term, the court may proceed to render final judgment instead of remanding the case to special term for further proceedings, when the record shows that the same judgment was rendered that should have been rendered at special term, and that in no event could any other judgment be properly rendered, whether at special or general term. *Stein v. Steamboat Prairie Rose*, 631.
6. EQUITY WILL ENJOIN ENFORCEMENT OF JUDGMENT, where the holder of notes, who had brought suit thereon against the maker, agreed that he would discharge the maker from personal liability on receiving, within a certain time, the note of a third person, retaining, however, his security by mortgage, and the note was duly delivered, but the holder prosecuted the suit, obtained judgment, and was about to enforce it. Such agreement is not a release, but must stand upon the footing of an agreement not to sue, nor to prosecute the suit already commenced, and therefore could not be availed of as a defense to the suit. *Hibbard v. Eastman*, 467.
7. EQUITY WILL ENJOIN ENFORCEMENT OF JUDGMENT, if any fact exists which clearly shows it to be against conscience to execute the judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence on his part. *Id.*
8. SUIT IS NOT ENDED UNTIL COMPLETE SATISFACTION OF or discharge from the judgment of the court therein. *Walton v. Sugg*, 580.
9. PLAINTIFFS IN SUIT ARE CONSTRUCTIVELY IN COURT ALL THE WHILE to see the proceedings from the beginning to the end, and they are bound to know what was the judgment of the court without special notice. *Id.*
10. SEVERAL WRONG-DOERS MAY EACH BE SEPARATELY PROCEEDED AGAINST TO JUDGMENT, although but one satisfaction can be had. *McReady v. Rogers*, 333.
11. VERDICT CANNOT OPERATE AS RES JUDICATA, for not until judgment does a matter become *res judicata*. *Id.*
12. JUDGMENT UPON ENTIRE AND INDIVISIBLE CONTRACT is a bar to a subsequent recovery upon the same cause of action. So where a boat was hired at a certain rate per day until delivered back in good order, without specifying any time when redelivery should take place, it was held that the boat should have been redelivered within a reasonable time, when the hire therefor would have been due, that the contract was entire, and that a judgment for the hire due at the end of such reasonable time was a bar to an action for hire thereafter accruing. *Stein v. Steamboat Prairie Rose*, 631.
13. OPENING JUDGMENT IN COURT OF LAW IS EX GRATIA; but restraining proceedings upon it, in a proper case, is of right. *Wistar v. McManes*, 700.
14. JUDGMENT OF COURT HAVING JURISDICTION OF MATTER CANNOT BE INQUIRED INTO IN COLLATERAL PROCEEDING, except for fraud in the manner of obtaining the judgment. *Hartman v. Ogborn*, 679.
15. WHERE PERSON AGAINST WHOM FOREIGN JUDGMENT WAS RENDERED is shown to have been regularly a party to the suit, no other court can, in an action on such judgment in another state, look to see whether the

court ought to have rendered such a judgment, but every other court must give full faith and credit thereto. *Walton v. Sugg*, 580.

See EJECTMENT, 2; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 14, 15; INFANCY; NUISANCE, 5; SET-OFF, 1, 2; SUBROGATION, 7.

JURISDICTION.

1. ACTION AGAINST VESSEL IN STATE COURT. — State courts have no jurisdiction of an action against a vessel by name, as this is an exercise of admiralty jurisdiction, a jurisdiction conferred exclusively upon the United States district court. *Griswold v. Steamboat Otter*, 239.
2. JUDGES WHO PRESIDE OVER COURT WHICH IS ONE OF BOTH LAW AND EQUITY ARE COMPETENT to decide any question of law, and if they deem an issue to try a fact necessary, are the tribunal to try it. *McCallum v. Germantown W. Co.*, 656.

JURY AND JURORS.

INHABITANT OF COUNTY IS COMPETENT TO SIT AS JUROR upon trial of person charged with larceny of the property of the county. *People v. Bennett*, 551.

LANDLORD AND TENANT.

1. COVENANT OF LESSEE FOR HIMSELF AND ASSIGNS to build houses on the land demised binds the assignees by express words, and the covenant runs with the land. *Garnhart v. Finney*, 303.
2. ACCEPTANCE OF RENT BY LANDLORD after notice or knowledge of a failure for which a forfeiture might have been claimed is a waiver of the forfeiture. *Id.*
3. ANY RECOGNITION OF TENANCY SUBSISTING after the right of entry has accrued and the landlord has notice of the forfeiture, has the effect of a waiver. Slight acts are sufficient for this purpose, such as a continuance of the lease without re-entering to take the land itself or an acceptance of the rent. *Id.*
4. ACCEPTANCE OF RENT WITH KNOWLEDGE OF PREVIOUS CAUSES OF FORFEITURE implies a still subsisting lease, and precludes a forfeiture afterwards for the same causes, and so the acceptance of performance of a building covenant, or of an agreement substituted in place of it, together with the continued acceptance of rent, has the same effect. *Id.*
5. LANDLORD WHO, BY HIS WORDS OR ACTS, knowingly causes his tenant to believe in the existence of a certain state of things, and induces him to act upon that belief, so as injuriously to alter his position, will be estopped from averring as against the tenant a different state of things as existing at that time, or if he asserts a fact upon which the tenant acts and will receive damage if the fact is not true, he will be estopped from contradicting it. *Id.*
6. LANDLORD WHO HAS WAIVED the forfeiture of the lease and accepted a substituted agreement and new arrangement cannot resist covenants to renew the lease. *Id.*
7. MEASURE OF DAMAGES FOR REFUSAL TO RENEW LEASE after a waiver of forfeiture by the landlord is the value of improvements made during the first term and the future value of the leasehold, less the expense of repairs made during the first term. *Id.*

See ESTOPPEL.

LARCENY.

See CRIMINAL LAW, 11-14; JURY AND JURORS.

LICENSE.

1. LICENSE MERELY, AND NOT PRESENT ESTATE, CORPOREAL OR INCORPOREAL, IS ACQUIRED by one to whom the owner of lands gave the right to sink wells thereon, agreeing to convey to him a portion thereof, if oil was found in it, and giving him an exclusive right to sink wells on the other portion for a certain sum for each ten years for every well from which he might continuously pump oil, and further agreeing that if he should fail to find oil, he might remove his buildings and machinery, and if oil were found, that the right to pump oil from the well should continue as the rent was paid. *Dark v. Johnston*, 732.
2. PAROL LICENSE, IT SEEMS, IS REVOCABLE AT PLEASURE OF LICENSER, before the licensee has expended labor or money on the faith of it, and it is none the less revocable because a consideration has been paid for it; but it is not so clear that a license given by deed is revocable at the pleasure of the grantor. *Id.*
3. LICENSE TO EXPLORE FOR OIL IS NOT REVOCABLE AT PLEASURE OF LICENSER, when it has not only been granted by deed, but the licensee has taken possession of the land and made large expenditures thereon, and with the understanding that if oil was discovered he would be entitled to a conveyance of a certain portion of the land, and to a lease of wells on the other portion. *Id.*
4. LICENSE IS PERSONAL PRIVILEGE, AND IS NOT ASSIGNABLE. An assignment by a licensee determines the right. *Id.*

LIENS.

See JUDGMENTS; VENDOR AND VENDEE.

LOST ARTICLES.

DISCOVERY OF ARTICLE VOLUNTARILY LAID DOWN BY OWNER within a banking-house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article, entitling the person discovering it to a reward offered to the finder. *Kincaid v. Eaton*, 142.

LOTTERIES.

See CRIMINAL LAW, 15-17.

LUNACY.

INQUISITION OF LUNACY FOUND IS PRIMA FACIE EVIDENCE ONLY, and not conclusive. *Tillow v. Tillow*, 691.

See WILLS, 9.

MARRIAGE AND DIVORCE.

1. DESERTION IS STATUTORY GROUND FOR DIVORCE. *Southwick v. Southwick*, 95.
2. WORD "DESERTION" IN STATUTE AUTHORIZING DIVORCE FOR THAT CAUSE DOES NOT SIGNIFY merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract. *Id.*

3. **LIBEL BY HUSBAND FOR DIVORCE FROM BOND OF MATRIMONY ON GROUND OF DESERTION** CANNOT BE SUPPORTED from the mere fact that his wife has refused for five consecutive years to have sexual intercourse with him, although such refusal might be unjustified by considerations of health or physical disability. *Id.*
4. **ARTICLES OF SEPARATION BETWEEN HUSBAND AND WIFE**, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced. *Collins v. Collins*, 606.
5. **MAN CANNOT AVOID MARRIAGE CONTRACT ON GROUND THAT WOMAN FRAUDULENTLY REPRESENTED HERSELF TO HIM AS CHASTE**, and thereby induced him to marry her, where he knew that she was unchaste before entering into the marriage contract with her. *Crehore v. Crehore*, 98.

See CRIMINAL LAW, 5-9.

MARRIED WOMEN.

1. **MARRIED WOMAN CANNOT ENCUMBER HER SEPARATE ESTATE** for the debt of another. *Hartman v. Ogborn*, 679.
2. **LIABILITY OF MARRIED WOMAN ON CONTRACT RELATING TO SOLE PROPERTY.** — A married woman, living with her husband, kept a boarding-house with his consent, and controlled the entire business: *held*, that a contract of purchase made by her in her own name for the purpose of such business must be regarded as a contract in relation to her sole property, upon which she was personally liable under the Michigan statute relating to married women. *Tillman v. Schackleton*, 198.
3. **PRODUCTS OF WIFE'S SEPARATE ESTATE AND PROPERTY PROCURED THEREWITH BELONG TO WIFE**, and cannot be reached by her husband's creditors because the labor of her husband and children entered into the products. *Rush v. Vought*, 769.
4. **WIFE IS ENTITLED TO BENEFIT OF PRODUCTS OR AVAILS OF LAND** when the evidence clearly shows the land to be her separate property. *Id.*

MISDEMEANOR.

See CRIMINAL LAW, 1.

MORTGAGES.

1. **MORTGAGE, WHAT CONSTITUTES.** — **BILL OF SALE OF PERSONAL PROPERTY INTENDED BY BOTH PARTIES AS SECURITY FOR MONEY LENT**, and an instrument of defeasance executed as a part of the same transaction, by the terms of which, on payment of the note at maturity, the bill of sale is to be given up and surrendered, must be construed together, and as constituting a mortgage. *Taber v. Hamlin*, 113.
2. **SUCCESSIVE RENEWALS OF NOTE SECURED BY MORTGAGE IS NOT PAYMENT OF MORTGAGE DEBT.** The mortgage remains a valid and subsisting security; and the condition of the mortgage is broken when the note last given remains unpaid after its maturity. *Id.*
3. **REGISTRATION IS NOT NECESSARY TO VALIDITY OF MORTGAGE OF SHIP OR VESSEL**, nor of goods at sea or abroad, if the mortgagee takes possession of them as soon as may be after their arrival in this state: See Mass. Gen. Stats. 1860, c. 151, sec. 2. *Id.*
4. **MORTGAGE OF PERSONAL PROPERTY AT COMMON LAW, PLEDGE EXCEPTED, SEEMS TO HAVE TRANSFERRED PROPERTY** absolutely to mortgagee upon

- a breach of the condition. No process of foreclosure was necessary, and no right of redemption remained. *Id.*
5. UNDER STATUTE OF MASSACHUSETTS, MORTGAGOR OF PERSONAL PROPERTY IS ALLOWED TO REDEEM at any time within sixty days after condition broken; and his right is not to be forfeited until sixty days after the mortgagee has given written notice of his intention to foreclose, and caused a copy of such notice to be recorded where the mortgage is recorded. *Id.*
 6. MORTGAGE NOT RECORDED, AND NOT REQUIRED TO BE RECORDED, IS TO BE FORECLOSED LIKE OTHER MORTGAGES, under the Massachusetts statutes, by sixty days' notice of the intention to do so, served as required by statute; but where the mortgage is valid without being recorded, the foreclosure notice is also valid without registration. *Id.*
 7. MORTGAGE OF PERSONAL PROPERTY PASSES WHOLE LEGAL TITLE TO MORTGAGEE, subject to be revested in the mortgagor upon the performance of the condition of the mortgage. And after breach of condition, the mortgagee has the right, after due notice, to sell the property, either at public or private sale. *Bryant v. Carson R. L. Co.*, 403.
 8. PURCHASER FROM MORTGAGEE OF PERSONALTY AFTER DUE NOTICE ACQUIRES INDEFEASIBLE TITLE to the property, and the mortgagor has no right to redeem from such purchaser. The fact that the purchaser knows that his vendor is only a mortgagee does not affect the title acquired by him. *Id.*
 9. MORTGAGEE OF PERSONAL PROPERTY MAY SELL WITHOUT ACTION, notwithstanding the provisions of section 246 of the Nevada practice act. *Id.*
 10. MORTGAGE OF PERSONAL PROPERTY WITHOUT DELIVERY is valid as between the parties thereto. *Id.*
 11. EFFECT OF WRIT OF SCIRE FACIAS ON MORTGAGE, when followed out to a sale, is to extinguish the equity of redemption, and transfer the estate to the purchaser as fully as it existed in the mortgagor before the mortgage. *Hartman v. Ogborn*, 679.
 12. AFTER SCIRE FACIAS ON MORTGAGE HAS RIPENED INTO JUDGMENT, the mortgage is merged in it, and is no longer open to attack. *Id.*
 13. IT CANNOT BE AVERRED AGAINST PURCHASER under a judgment, recovered after two returns of *nil*, that the mortgage was void because it was executed by a married woman. *Id.*
 14. MORTGAGEE WHOSE MORTGAGE DEBT EXCEEDS VALUE OF PROPERTY covered by the mortgage is entitled to an injunction restraining an execution creditor of the mortgagor from levying upon the mortgaged property, when the mortgagor is insolvent. *Lane v. Baughman*, 653.
 15. JUDGMENT CREDITOR HAS NO RIGHT TO DISCONNECT, REMOVE, AND SELL portions of mortgaged property, when by so doing he would diminish the security of the mortgagee, admitted to be inadequate. His remedy is in equity, when he is entitled to have his claim paid out of the earnings of the mortgaged property, to charge them as a fund, and subject so much thereof as may be necessary to the payment of his judgment; or he may have the interest of the mortgagor ascertained and subjected in such mode as may be consistent with the rights of the mortgagee to the payment of his judgment. *Id.*
 16. WHERE ORGANIZED COUNTY IS ATTACHED TO ANOTHER COUNTY FOR JUDICIAL PURPOSES, FORECLOSURE SALE of mortgaged premises may be conducted by the sheriff of the former county, as there is nothing of a judicial nature about such a performance. *Berthold v. Holman*, 233.

17. **RIGHTS AND TITLE OF MORTGAGOR.** — Mortgage is only security, and until foreclosure the title to the mortgaged premises remains in the mortgagor, who may sell the land, subject to the mortgage, or convert part of the realty into personalty, and dispose of that subject to the right of the mortgagee to keep his security good. *Id.*
18. **PURCHASER AT FORECLOSURE SALE ACQUIRES NO TITLE TO PINE TREES SEVERED AND CONVERTED INTO LOGS** before the sale, where he bid the full amount due on the mortgage for the land, although the logs were on the premises at the time. The purchase for the full amount of the mortgage was a satisfaction of the debt, and as the mortgage was a mere security, the mortgagee could ask for nothing more. *Id.*
19. **LOGS CUT UPON MORTGAGED PREMISES WITHIN ONE YEAR AFTER FORECLOSURE** by the mortgagor in possession, who has a right to redeem within that time, cannot be recovered in an action of claim and delivery or replevin by the purchaser at the foreclosure sale, and as during that time he has no possession nor right to possession of the land upon which they were cut, he could have no right to the possession of the trees severed therefrom and converted into logs. *Id.*
20. **IMPAIRING OBLIGATION OF CONTRACT.** — Legislation providing that the mortgagor shall upon payment of interest retain possession of the mortgaged premises for one year after foreclosure does not impair the mortgage contract; it at most affects the remedy only. *Id.*

See DEEDS, 3; POWERS; TRESPASS; TRUSTS, 1, 2.

NEGLIGENCE.

1. **NEGLIGENCE IS ABSENCE OF CARE** according to the circumstances. *Frankford T. Co. v. Phila. R. R. Co.*, 708.
2. **QUESTIONS OF SKILL, VIGILANCE, CARE, AND PROPER MANAGEMENT** in any business are necessarily questions of fact to be referred to a jury. *Id.*
3. **CIRCUMSTANCES SHOWING WHEN "DUE CARE" IS QUESTION OF FACT.** — Upon the trial of an action brought by a passenger for an injury sustained by the fall upon him of a small boat suspended over the main deck of a steamboat, the question whether he was in the exercise of due care in taking his position in a place assigned for the use of passengers, under the small boat, at a time when he saw two persons in it, and in continuing to stand there, without attempting to move away, while he saw two or three other persons enter it; and the question as to whether the defendants took the proper precautions in securing the larboard boat, or preventing passengers from standing under it or getting into it, are questions of fact for the jury. *Simmons v. New Bedford V. & N. S. Co.*, 99.
4. **PLAINTIFF IN NEGLIGENCE CANNOT RECOVER IF HE WAS HIMSELF NEGLIGENT.** *Id.*
5. **CONFLICTING EVIDENCE AS TO NEGLIGENCE SHOULD BE SUBMITTED TO JURY.** *Id.*
6. **ADMISSIBLE AND INADMISSIBLE EVIDENCE IN ACTION OF TORT FOR INJURY SUSTAINED BY PLAINTIFF WHILE PASSENGER ON BOARD DEFENDANTS' STEAMBOAT.** — Where the injury complained of in such action was sustained by the fall upon the plaintiff of a small boat, which was suspended over the main deck on the larboard side of the defendants' steamboat, and which fell at a time when four or five persons were in it and another was trying to get into it, the opinion of a witness at the trial, whether it was not manifestly to the discernment of passengers of common under-

- standing an inappropriate place for passengers to be in, was held inadmissible in evidence. But evidence that passengers had been in the habit of sitting in it so frequently before the accident that the officers of the steamboat must have known of such habit was held admissible; though such evidence would not necessarily show that they had any reason to suppose that such occupation would be dangerous. *Id.*
7. EVIDENCE OF DISREGARD BY PASSENGERS OF STEAMBOAT RULES AS TO STARBOARD BOAT, rails, or hurricane deck has no tendency to show either a license, permission, or custom affecting the larboard boat, or that there was danger of its being abusively or otherwise irregularly used by passengers, or in a manner dangerous to other passengers; such evidence is incompetent as to the use of the larboard boat, and the jury should be instructed to this effect, where such evidence has been received in an action against the steamboat company, by a passenger who has been injured by the fall of the larboard boat upon him. *Id.*
8. IN ACTION FOR DAMAGES FOR INJURIES CAUSING DEATH, REFUSAL TO CHARGE that "the fact that deceased was a child makes no difference in the application of the rule of law as to the question of negligence," and that "if he was not of years of discretion, he should have had a protector," is not error, if the court has charged generally that contributory negligence on the part of the child will bar recovery; but that if he was not negligent, and there was negligence on the part of the defendant, the plaintiff may recover. *Sheridan v. Brooklyn & N. R. R. Co.*, 490.
9. INJURY NOT ACTIONABLE WHEN CAUSE NOT PROXIMATE. — The plaintiff left his hoisting-shears where he had last used them, secured by two guys. A stevedore cast loose the front guy and wound it around one of the shears, leaving it in that position. Some boys swung upon the rear guy, causing the shears to fall and break in pieces. It appeared that they would not have fallen, except by the swinging of the boys, and that the swinging of the boys would not have overturned them if the front guy had been refastened. *Held*, that the stevedore was not liable for the injury to the shears. *Tutein v. Hurley*, 154.
10. INJURY FROM OVERFLOW CAUSED BY NEGLIGENT CONSTRUCTION OF DRAIN LEADING INTO COMMON SEWER, LIABILITY FOR. — The plaintiff and the defendant were abutters on a passage-way, through which ran the common sewer used by such abutters. The tide ebbed and flowed through the sewer, and the plaintiff for more than twenty years had used it for the purpose of draining his cellar. The defendant, in attempting to lay a drain from his cellar into the sewer, opened the walls of the latter, and removed the earth around it, and replaced the earth so loosely that the water escaped from the sewer through the opening and the loose earth into the plaintiff's cellar, and injured his property. *Held*, that the defendant was liable for the injury done, although his acts in building the drain were done upon his own land. *Hawkesworth v. Thompson*, 137.
11. ACTION LIES AGAINST TWO JOINTLY WHO JOINTLY SUPERINTENDED work which was so negligently done, on the land of one of them, that it caused injury to the plaintiff, although one rendered his services to the other gratuitously, and not under any contract. *Id.*
12. OWNER OF DAM, ALTHOUGH ERECTED ON HIS OWN LAND, IS ANSWERABLE FOR INJURIES to the land of another occasioned or enhanced by the dam, not only in ordinary stages of the water, but in ordinarily recurring freshets. *Cassbeer v. Mowry*, 766.

See COMMON CARRIERS.

NEGOTIABLE INSTRUMENTS.

1. **PARTY TAKING NOTE SIGNED AND INDORSED IN BLANK**, with blanks in the body of the note for insertion of the amount, but with figures in the corner specifying a certain sum, is bound to take notice that the note cannot be filled for a larger sum than that specified in the corner, and is put on inquiry as to the authority of the party offering the note to fill the blank with a larger sum. *Henderson v. Bondurant*, 281.
2. **PROMISSORY NOTE INDORSED IN WORDS "I ASSIGN THE WITHIN TO K. for value received, and bind myself to paying it promptly after maturity, if not paid by the drawers at maturity,"** imposes on the indorser the liability the guarantor, and in such a case, upon the failure of the makers to pay at maturity, the holder may recover the amount of the note without proof of demand and notice. *Baker v. Kelly*, 274.
3. **TO FIX LIABILITY OF GUARANTOR OF PROMISSORY NOTE**, acceptance and notice by the holder, as in cases of letters of credit with guaranty, are unnecessary, and it is likewise unnecessary upon failure of the makers to pay at maturity, to make demand and give notice as in ordinary cases of indorsements. *Id.*
4. **BURDEN OF PROOF IS UPON INDORSEE OF PROMISSORY NOTE** of showing that he is a *bona fide* holder, for value, in an action upon the note by him against the maker, when the note was obtained from the maker by fraud. *Perkins v. Prout*, 449.
5. **BURDEN OF PROOF IN ACTION ON PROMISSORY NOTE, BROUGHT BY HOLDER AGAINST MAKER**, is ON DEFENDANT to prove that the note was given in whole or in part for the price of intoxicating liquors sold by the plaintiff in violation of law. *Pratt v. Langdon*, 61.
6. **ALTERATION OF NUMBERS UPON SERIES OF NEGOTIABLE BONDS OF COMMONWEALTH IS IMMATERIAL**, where the law does not require the bonds to be numbered, and the presence or absence of the number does not affect in substance or form the written contract or the proof thereof. *Commonwealth v. Emigrant Savings Bank*, 126.
7. **IMMATERIAL ALTERATION OF NEGOTIABLE BONDS PAYABLE TO BEARER, THOUGH MADE WITH FRAUDULENT INTENT**, does not avoid them in the hands of a *bona fide* holder, for value without notice, whose title is acquired after the alteration. *Id.*

See AGENCY, 7, 8; GIFTS; TELEGRAPHS, 1-4.

NOTICE.

PERSON WHO DERIVES TITLE THROUGH OR UNDER JUDICIAL PROCEEDING is chargeable with notice of whatever appears in the record. *Ware v. Houghton*, 258.

See ATTORNEY AND CLIENT; BANKS AND BANKING, 3; EVIDENCE, 1; NUISANCE, 4.

NUISANCE.

1. **ONE CANNOT WITH IMPUNITY INVADE PREMISES OF ANOTHER BY NUISANCE**, because the damage may be inappreciable. The law allows the recovery of nominal damages, at least, as evidence of the plaintiff's right. *Caebeer v. Mowry*, 766.
2. **PARTY WHO ACQUIRES TITLE TO PREMISES ON WHICH NUISANCE EXISTS BECOMES LIABLE** to other persons injured by the continuance of the nuisance after due notice to remove it. *Nichols v. City of Boston*, 132.

3. **KNOWLEDGE BY GRANTEE OF LAND OF CONTINUANCE OF NUISANCE THEREON, WHEN HE ACQUIRED TITLE**, is not shown by the fact that he had knowledge of a judgment against his grantor for a like nuisance existing thereon the year previous to the conveyance. *Id.*
4. **NOTICE OF NUISANCE ON LAND BELONGING TO CITY, AND REQUEST TO REMOVE IT, GIVEN TO CITY CLERK ONLY**, is insufficient to affect the city, but is sufficient if given to the mayor. *Id.*
5. **JUDGMENT IN PRIOR ACTION FOR NUISANCE ESTABLISHES PLAINTIFF'S RIGHT AND DEFENDANT'S WRONG**, but not the amount of damages, in a subsequent action between the same parties for a continuance of the nuisance, although such judgment did not exist when the subsequent action was brought. *Casebeer v. Mowry*, 766.

OFFICE AND OFFICERS.

IT IS MISJOINDER OF PARTIES, where persons claiming to be wardens and other persons claiming to be vestrymen of a church join as relators to test in one proceeding their rights to the offices respectively, against parties claiming adversely. *People v. De Mill*, 179.

See BONDS.

PARENT AND CHILD.

1. **MOTHER IS NOT BOUND AT LAW TO MAINTAIN MINOR CHILD**, and is not entitled to the correlative right of service. *Fairmount R'y Co. v. Statler*, 714.
2. **RELATION OF MISTRESS AND SERVANT CAN BE CONSTITUTED BETWEEN MOTHER AND CHILD ONLY** as it may be done between strangers in blood, except that less evidence might establish it. *Id.*
3. **MOTHER'S RIGHT TO ACTION FOR INJURY TO CHILD** cannot be rested on her liability for his support under the poor laws. *Id.*
4. **ACTION CANNOT BE MAINTAINED BY WIDOWED MOTHER OF MINOR SON**, who supports himself by his own labor, for a personal injury to him, resulting from the negligence of a railroad company to whom he had paid his fare as a passenger. *Id.*
5. **MINOR CHILDREN MAY ASSIST WITH FATHER'S ASSENT IN WORK ON WIFE'S FARM** without giving the husband any title to the products, the children being entitled by the terms of the deed to their maintenance from it. *Rush v. Vought*, 769.

PARTITION.

1. **PARTITION OF LAND BY PAROL IS NOT VALID**, notwithstanding the division line was marked and monuments set up, and the parties for several years occupied in accordance with the division so made. *Ballou v. Hale*, 438.
2. **PAROL PARTITION OF REALTY BY CO-TENANTS, IF FOLLOWED BY EXCLUSIVE POSSESSION** and acts of ownership by each of them respectively, will bind them and their heirs. *Wood v. Fleet*, 528.
3. **SEVERAL OCCUPATION, IN ACCORDANCE WITH PAROL PARTITION BETWEEN TENANTS IN COMMON, IS NOT ASSENT** by one tenant to a conveyance by his co-tenant, by metes and bounds, of the portion of the land thus assigned to the latter as his share; although if continued for twenty years, and under such circumstances as to make it adverse, it would establish the title. *Ballou v. Hale*, 438.

4. COURT OF EQUITY, IN DECREETING PARTITION, MAY DIRECT ACCOUNTING in a proper case, and require each of the co-tenants to pay his equitable proportion of the expenses incurred in the development or improvement of the joint property. *Dall v. Confidence S. Mfg. Co.*, 419.
5. IN SUIT FOR PARTITION, COURT SHOULD NOT DECREE SALE of the property, except in cases where a division thereof would manifestly be injurious to the interests of the co-tenants. *Id.*
6. UNDER NEVADA STATUTE, IF ONE OF CO-TENANTS FILES AFFIDAVIT showing that the sale of an entire mining claim would be injurious to him, the court must divide the claim as prescribed by the statute. A sworn answer setting up the same matter takes the place of such affidavit, and is sufficient. *Id.*
7. COMPENSATION CANNOT BE ALLOWED IN PARTITION SUIT for cost of improvements on adjoining property, which incidentally enhance the value of the common property. *Id.*

See CO-TENANCY.

PARTNERSHIP.

1. PERSON WHO HAS NOT AGREED TO BE PARTNER, NOR HELD HIMSELF OUT AS SUCH, IS YET LIABLE AS PARTNER TO THIRD PERSONS, if by the agreement under which the business is carried on he has an interest in a certain share of the profits as profits, and a lien on the whole profits as security for his share. *Pratt v. Langdon*, 61.
2. PERSON NOT ACTUALLY PARTNER CANNOT BE HELD LIABLE AS PARTNER TO THIRD PERSONS who know that he is not a partner. *Id.*
3. LIABILITY OF OSTENSIBLE PARTNER TO THIRD PERSON. — L. bought a stock of goods, hired a shop in which to carry on business, and permitted W. to carry it on in W.'s name, under an agreement that W. should pay all expenses of the business, and always keep a stock of goods on hand equal in value to the amount paid by L., and ultimately pay to L. that amount, and that L. should receive one half of the net profits of the business, and should have a right to secure himself by taking possession at any time: *Held*, that L. was liable for a debt incurred by W. for goods used in carrying on the business, to one who had sold them relying on the belief that L. was a partner in the business with W. *Id.*
4. SURVIVING PARTNER WHO HAS BEEN APPOINTED one of the administrators of the deceased partner cannot maintain a bill for an accounting against his co-administrator, especially when the bill charges fraud against the deceased. His only remedy is to have the letters of administration revoked. *Smith v. Bryson*, 610.
5. WHERE PARTNER UPON DISSOLUTION OF FIRM takes all notes and accounts into possession, and assumes control in regard to making collections and settling up the business, he is to be treated as a collecting agent, and should be charged with all notes and accounts which he has collected, or might with reasonable diligence have collected; but he is not to be charged with those not proved to be solvent, and which it is not shown could have been collected with reasonable diligence. *Phelan v. Hutchinson*, 602.
6. WHERE, IN SETTLING UP ACCOUNTS OF DISSOLVED PARTNERSHIP, interest is charged upon notes and accounts upon a wrong principle, the calculation will not be disturbed if no substantial injury is done. *Id.*
7. IN TAKING PARTNERSHIP ACCOUNT UPON DISSOLUTION of the firm, the capital stock should not be taken into account until a balance is struck,

and then, if there is any fund on hand, each should be allowed to withdraw his capital, or a ratable part of it. *Id.*

9. IN TAKING PARTNERSHIP ACCOUNT OF DISSOLVED FIRM, debts due from one of the partners to the firm should not be deducted out of the assets of the firm. They should be deducted out of the portion coming to him after a balance has been struck. *Id.*
9. WHETHER PARTNER WHO WINDS UP PARTNERSHIP AFFAIRS should be allowed reasonable commissions, as compensation for his time and trouble, *quære. Id.*
10. PARTNERS ARE ENTITLED TO CLAIM BENEFIT OF EXEMPTION LAW as to property belonging to the partnership. *Stewart v. Brown*, 578.

PARTY-WALLS.

1. RIGHT OF ADJOINING OWNER TO USE PARTY-WALL DOES NOT CONSTITUTE SUCH ENCUMBRANCE upon the premises or defect in the title thereof as will relieve the vendee from his contract for the purchase thereof. *Hendricks v. Stark*, 549.
2. DESCRIPTION IN NOTICE OF SALE OF PREMISES AS "COLLINS HOTEL" does not import, *ex vi termini*, that the walls are party-walls, or of a different character. *Id.*

PAYMENT.

See PLEADING AND PRACTICE, 2.

PLEADING AND PRACTICE.

1. PRECEDENTS ARE EVIDENCE OF LAW. *Smith v. Commonwealth*, 686.
2. PAYMENT, TENDER, AND READINESS TO PAY ARE AFFIRMATIVE PLEAS, casting the burden of proof upon the defendant. *North Pennsylvania R. R. Co. v. Adams*, 677.
3. ANSWER MAY BE HELD TO AID COMPLAINT which distinctly sets out most of the facts necessary to entitle the plaintiff to the relief sought, but omits some material facts, where the facts so omitted are clearly stated and admitted in the answer. *Hawthorne v. Smith*, 397.
4. WHILE WRITTEN EVIDENCE MAY BE FILED AS EXHIBITS, AND REFERRED TO as part of the pleading, good pleading requires that the substance of such evidence shall be set forth by proper averments in the pleading. *Harvey v. Kelly*, 267.
5. UPON MOTION FOR NONSUIT, WHERE EVIDENCE IS CONFLICTING, court should assume that view which is most favorable to the plaintiff. *Sheridan v. Brooklyn and Newton R. R. Co.*, 490.
6. IT IS WHOLLY WITHIN DISCRETION OF COURT TO GRANT OR DENY a motion made, after a plaintiff has put in his evidence, for a ruling that, "assuming that all the facts offered to be proved by the plaintiff were actually and fully proved, the plaintiff was not entitled to recover," and no exception lies to its decision. *Bradley v. Poole*, 144.
7. REFUSAL TO ORDER NONSUIT IS NOT REVIEWABLE in the supreme court. *U. S. Telegraph Co. v. Wenger*, 751.
8. REFUSAL TO STRIKE OUT EVIDENCE, ADMITTED WITHOUT OBJECTION, IS NOT SUBJECT OF EXCEPTION. The proper mode is to request the court to charge that it be disregarded. *Id.*
9. OMISSION OF COURT BELOW TO INSTRUCT ON ANY POINT CANNOT BE COMPLAINED OF, where the court was not asked to give such instruction. *Seigel v. Robinson*, 775.

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20. **GENERAL EXCEPTION TO INSTRUCTION IS UNAVAILING IF IT INVOLVE MORE THAN SINGLE PROPOSITION**, and any portion of it be correct; but in such case each portion of it which is claimed to be erroneous must be specifically excepted to. *McReady v. Rogers*, 333.
 21. **PRACTICE AS TO VERDICT AGAINST TWO JOINT DEMANDANTS.** — Where two wards are joint demandants in a real action as tenants in common, and where a verdict against both has been properly rendered against one of them, the tenant is entitled to judgment against both; for where the proof of title of either is defective, the action must fail as to both, unless the writ is amended by striking out the name of one before verdict; and if a verdict has been rendered against both, under erroneous instructions as to the title of one, the judgment ought not to conclude that one, and he may therefore have the verdict set aside as to him, in order that he may become nonsuit. The tenant will then have his judgment against both demandants, and the nonsuited one may prosecute his right by a separate suit. *Chandler v. Simmons*, 117.
 22. **VERDICT CANNOT OPERATE AS ABATEMENT OF ACTION** unless rendered in a suit for the identical cause of action, and between the same parties. *McReady v. Rogers*, 333.
 23. **VERDICT WILL NOT BE SET ASIDE MERELY BECAUSE IT IS AGAINST WEIGHT OF EVIDENCE.** *Bryant v. Carson R. L. Co.*, 403.
 24. **DISTINCT STATEMENT ON APPEAL IS NOT NECESSARY** where the record contains a statement used on a motion for a new trial, which purports to contain all the material evidence adduced upon the trial, and an assignment of the errors complained of by the appellant, when the appeal is taken both from the judgment and the order refusing a new trial. *Id.*
 25. **PRIOR ACTION COMMENCED IN ONE STATE MUST BE BAR TO SUBSEQUENT PROCESS IN ANOTHER** to charge the defendant as the trustee of the plaintiff in the prior action. *Whipple v. Robbins*, 64.
- See **AGENCY**, 11; **DAMAGES**, 2-4; **EQUITY**; **ESTATES OF DECEDENTS**; **EVIDENCE**; **OFFICE AND OFFICERS**, 1.

PLEDGE.

See **EXECUTIONS**, 1; **MORTGAGES**, 4.

POWERS.

1. **TO EFFECT VALID SALE UNDER POWER**, all the directions of the power must be complied with. *Cranston v. Crane*, 106.
2. **WHEN POWER OF SALE MERELY AUTHORIZES DONEE TO EXECUTE DEED IN NAME OF DONOR**, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power, and not of the donee. *Id.*
3. **POWER OF SALE MAY BE GIVEN TO BE EXECUTED BY DEED OF DONEE**; and when such is the case, the deed of sale not only may but must be executed under the hand and seal of the donee of the power. *Id.*
4. **POWER OF SALE MAY BE GIVEN IN ALTERNATIVE**; and when such is the case, the deed of sale may be executed either by the donor or donee of the power. *Id.*
5. **POWER OF SALE IN MORTGAGE OF REAL ESTATE WHICH AUTHORIZES MORTGAGEE** "to make, execute, and deliver to the purchaser all necessary conveyances for the purpose of vesting in him the premises sold in fee-simple absolute," may be executed by the deed of the mortgagee, reciting

the power, and signed and sealed with his own name and seal; and if the mortgagee is a married woman, it is not necessary for her husband to join in the conveyance, or consent thereto in writing: See Mass. Gen. Stats. 1860, c. 108, sec. 3. *Id.*

6. **EXECUTION OF POWER OF SALE IN MORTGAGE OF REAL ESTATE — ENTRY BY MORTGAGEE UNNECESSARY WHEN — ACTS WHICH MORTGAGEE MAY EXECUTE THROUGH OTHERS.** — Power of sale in mortgage of real estate, which provides that on breach of the condition "it shall be lawful for the mortgagee to enter into and upon the premises, and sell and dispose of the same, and all benefit and equity of redemption of the mortgagor therein, at public auction, such sale to be upon the premises granted, first giving notice of the time and place of sale," may be lawfully executed without the mortgagee entering upon the premises at any other time or in any other manner than at the time of the sale and for the purposes thereof; and the entry upon the premises, the giving of the notice, and the conduct of the sale are acts which the mortgagee may execute, and whose authority therefor need not be under seal or in writing. *Id.*
7. **UPON BREACH OF CONDITION IN MORTGAGE OF REAL ESTATE CONTAINING POWER TO SELL,** the right to sell attaches at once. *Id.*
8. **FORECLOSURE OF MORTGAGE OF REAL ESTATE CONTAINING POWER TO SELL IS MADE COMPLETE BY SALE.** *Id.*
9. **REDEMPTION AFTER BREACH OF CONDITION IN MORTGAGE IS EQUITABLE RIGHT.** No remedy is given at law; and it must be enforced as authorized by statute, by a suit in equity. *Id.*
10. **POWER TO SELL CONTAINED IN MORTGAGE OF REAL ESTATE** is a power coupled with an interest, and cannot be revoked. *Id.*
11. **TENDER, AFTER BREACH OF CONDITION IN MORTGAGE OF REAL ESTATE CONTAINING POWER TO SELL, IS MERELY FOUNDATION** for the equitable remedy of a suit to redeem. If a tender be made and not accepted, the mortgagor may recover the premises by a suit in equity for redemption. This applies to a tender made before as well as after an entry for breach of the condition. If not accepted, it has no effect upon the legal estate. It does not prevent nor delay foreclosure, unless a suit to redeem is brought within a year afterwards. The effect of the breach is not removed by a tender alone, but by the suit in equity to redeem which follows such tender; and a sale under the power, so far as it operates to transfer the legal title and possession, cannot be defeated by the tender. *Id.*
12. **IN SOME CASES, COURT WILL RELIEVE AGAINST FORFEITURE OF ESTATE, IN SUIT AT LAW TO ENFORCE FORFEITURE AFTER BREACH,** by ordering a stay of proceedings upon full performance. The conditional judgment in an action to foreclose a mortgage is of this nature, though it is now secured to the party by statute. But when the parties have provided another mode, by which a foreclosure may be effected without the necessity of such a suit, no such relief can be given. *Id.*
13. **DEFENSE TO WRIT OF ENTRY IS INSUFFICIENT WHEN.** — WHERE MORTGAGED REAL ESTATE IS SOLD AND CONVEYED to the purchaser under a power of sale contained in the mortgage, which authorized the mortgagee, upon breach of the condition, "to sell the premises, and all benefit and equity of redemption of the mortgagor therein," "and to execute and deliver all necessary conveyances for the purpose of vesting in the purchaser the premises sold, in fee-simple absolute"; and if the mortgagor has not obtained a decree in equity to restore him to the legal

right of possession which he forfeited by breach of the condition in failing to pay interest on the stipulated day, — it is no defense to a writ of entry brought against the mortgagor by such purchaser for possession of the premises that he purchased the same with notice that after the breach, but before the sale, the mortgagor tendered to the mortgagee the amount of the interest in default, with interest thereon to the date of the tender, and with full compensation for all expenses and trouble incurred in preparing to execute the power of sale. *Id.*

PRESCRIPTION.

See **ADVERSE POSSESSION**; **RIPARIAN RIGHTS**, 3; **WAYS**, 4.

PROBATE COURTS.

See **ESTATES OF DECEDENTS**.

PROPERTY.

OIL, LIKE WATER, IS NOT SUBJECT OF PROPERTY, except while in actual occupancy. *Dart v. Johnston*, 732.

PUBLIC POLICY.

See **CONTRACTS**, 2.

QUESTIONS OF LAW AND FACT.

See **AGENCY**, 6; **NEGLIGENCE**.

QUO WARRANTO.

See **CORPORATIONS**, 8-11; **OFFICE AND OFFICERS**.

RAILROADS.

1. **RAILROAD COMPANY MAY LOCATE ITS ROADS AND STATIONS ON SUCH ROUTE** and at such points as in its judgment will be beneficial to its own and the public interest, in the absence in its charter of any prescribed limit of approach towards buildings and bridges. *Frankford T. Co. v. Philadelphia R. R. Co.*, 708.
2. **EMISSION OF SPARKS FROM STACK OF LOCOMOTIVE IS NOT IN ITSELF ILLEGAL**, and a loss of property adjacent to a railroad from the sparks, apart from misuse, is *damnum absque injuria*. *Id.*
3. **LAW, IN CONFERRING RIGHT TO USE ELEMENT OF DANGER, PROTECTS** the person using it, except for his abuse of his privilege; but in proportion to its danger will arise the degree of caution and care he must use. *Id.*
4. **IT IS DUTY OF RAILROAD COMPANY** running its engines in close proximity to buildings to use the utmost vigilance and foresight to avoid injury. *Id.*
5. **RAILROAD COMPANY ACTING UNDER SPECIAL CHARTER, WHICH LEASES LINE CONSTRUCTED UNDER GENERAL RAILROAD LAW**, with respect to the business transacted by them on said leased road, are governed by the provisions of the general railroad law, and cannot claim the benefit of such exemptions as are contained in their original charter. *McMillan v. Michigan S. & N. R. R.*, 208.
6. **RAILROAD COMPANY IS NOT LIABLE IN DAMAGES FOR DESTRUCTION OF BRIDGE** by sparks from its locomotive if it used that degree of care and vigilance which the relative location of its road to other structures de-

manded. The exercise of ordinary care in procuring a good and safe spark-catcher, such as are in ordinary use, and approved by experienced railroad operators and mechanics, is sufficient on the part of the company. *Frankford T. Co. v. Philadelphia R. R. Co.*, 708.

See AGENCY, 10; COMMON CARRIERS; EMINENT DOMAIN, 4, 5.

REALTY.

1. OWNERSHIP OF LAND CARRIES WITH IT RIGHT TO ITS PRODUCTS, at law and in equity. No change can take place in the title to the fruits of the soil, without the owner parts with his title or possession, or permits its cultivation for the benefit of another. *Rush v. Vought*, 769.
2. LABOR OF OTHERS FOR OWNER OF SOIL CREATES NO TITLE TO PRODUCTS, though mingling in the production. *Id.*

REFEREES.

1. REFEREE IS NOT OFFICER WITHIN MEANING OF CONSTITUTIONAL PROVISION requiring all executive and judicial officers to be sworn before assuming their duties. *Underwood v. McDuffee*, 194.
2. JUDICIAL POWER, IN CONSTITUTIONAL SENSE, IS NOT EXERCISED BY REFEREE in determining facts in a cause submitted to him, but by the court in giving judgment. *Id.*
3. UNLESS CERTAIN THAT REFEREE IS IN ERROR IN FINDINGS OF FACT, court will sustain such findings. *Westerlo v. De Witt*, 517.

REPLEVIN.

1. REPLEVIN LIES IN PENNSYLVANIA WHEREVER ONE CLAIMS GOODS IN POSSESSION OF ANOTHER, without regard to the manner in which the possession was obtained. *Herdie v. Young*, 739.
2. REPLEVIN IS FOUNDED UPON UNLAWFUL TAKING, which fixes the character of the recovery, and enters directly into the question of damages. *Id.*
3. REPLEVIN SOUNDS IN DAMAGES AS TRESPASS; and, it seems, exemplary damages may be given where there has been outrage in the taking, or vexation and oppression in the detention. *Id.*
4. VERDICT FOR PLAINTIFF IN REPLEVIN TRANSFERS TITLE TO DEFENDANT, it seems, on a plea of property and retention by the defendant. *Id.*
5. MEASURE OF DAMAGES IN REPLEVIN MAY BE LESS THAN VALUE OF PROPERTY in a proper case, as it may go beyond the value to compensate for injustice and outrage. *Id.*
6. MEASURE OF DAMAGES IN REPLEVIN FOR LOGS CUT FROM ADJOINING TRACT THROUGH BONA FIDE MISTAKE as to the boundary line, and transported to a boom, is the value of the logs at the boom, less the cost of cutting, hauling, and driving them there. *Id.*

See BAILMENTS; CONTRACTS, 7.

RES ADJUDICATA.

See ESTATES OF DECEDENTS, 6; JUDGMENTS, 11, 12.

RESCISSION.

See CONTRACTS, 4-8; SALES, 3, 9.

RESTRAINT OF TRADE.

See DAMAGES, 1.

RIPARIAN RIGHTS.

1. **PRESCRIPTIVE RIGHT TO RENDER RUNNING WATER UNFIT FOR DRINKING** or domestic purposes requires the strictest proof of its existence. *McCallum v. Germantown Water Company*, 656.
2. **NO ONE HAS RIGHT TO POLLUTE WATER FLOWING THROUGH HIS LANDS** so as to render it unfit to be used by the land-owner below for domestic purposes. *Id.*
3. **UPPER RIPARIAN PROPRIETOR CLAIMING RIGHT BY PRESCRIPTION TO POLLUTE STREAM** cannot do so to a greater extent than it was polluted at the commencement of the twenty-one years. The right must be measured by the enjoyment. *Id.*

SALES.

1. **MERE CONTRACT TO SELL PERSONAL PROPERTY WITHOUT ANY DELIVERY**, either actual or symbolical, does not pass the title as against third persons, although it may have that effect as against the vendor. *Brown v. Pierce*, 57.
2. **AS BETWEEN TWO BONA FIDE PURCHASERS OF SAME CHATTELS**, he who first obtains delivery and possession of them has the better title against the other, notwithstanding the contract of sale of the latter with the vendor may have been prior in point of time to that of the former. *Id.*
3. **FRAUD DOES NOT OF ITSELF RENDER SALE VOID**, but only voidable at the election of the vendor. Until avoided or rescinded, the contract of sale remains in force, and the title to the property passes to the vendee. The vendor may, if he sees fit, set it aside on the ground that it was procured by fraud; but unless a rescission is made, the sale takes effect and the property passes. *Id.*
4. **INSTRUCTIONS TO JURY — FALSE AND FRAUDULENT REPRESENTATIONS.** — The plaintiff bought certain pretended shares in a corporation fraudulently organized, induced thereto by the alleged false and fraudulent representations of the defendant "that said corporation was all right, and would immediately prosecute the development of its property, and the business for which it was organized." *Held*, that it was properly left to the jury to interpret these statements, in connection with all the circumstances of the case. *Bradley v. Poole*, 144.
5. **KNOWLEDGE ON PART OF PLAINTIFF OF CONDITION OF CORPORATION**, *held* to be insufficient ground, in the particular case, for setting aside a verdict in his favor rendered in an action brought by him to recover money obtained by false and fraudulent representations made in the sale of stock. *Id.*
6. **ACTION ON IMPLIED WARRANTY OF TITLE MAY BE MAINTAINED BY VENDEE OF WOOD**, where he has paid for it, but can obtain no title thereto. *Brown v. Pierce*, 57.
7. **RESPECTIVE RIGHTS OF PURCHASERS FROM SAME VENDOR.** — Where T., by means of fraudulent representations to P., procures the sale to himself of a portion of certain chattels owned by P., but of which T. at the time is in lawful possession, and P. does no act to disaffirm T.'s title on the ground of such fraud, T. may reclaim and maintain possession of the entire portion so sold to himself against a subsequent *bona fide* purchaser to whom P. has sold and delivered part of the same under the mistaken belief that the total quantity of chattels was sufficient to satisfy both sales, although such belief was induced by the fraudulent

representations of T.; and the second purchaser, in an action against P. on the warranty of title implied in the sale to himself, may recover the value of the chattels so reclaimed from him by T. *Id.*

8. PURCHASER OF SLAVES AT SALE UNDER VOID ORDER OF PROBATE COURT cannot plead as an excuse for failure to rescind, by returning or offering to return the slaves, the fact that he did not discover the defect of title until after emancipation of the slaves, and that he could not then return them. *Ware v. Houghton*, 258.
9. PURCHASER WITH WARRANTY ELECTING TO RESCIND SALE FOR SOME DEFECT IN TITLE OR QUALITY must forthwith return or tender back the subject-matter of the sale, or give notice to the seller to take it back; and if instead he keeps the property an unreasonable time, or uses it and exercises the dominion of an owner, he cannot treat the sale as void. *Id.*

See BAILMENTS; EXECUTORS AND ADMINISTRATORS, 10-12; POWERS; STATUTE OF FRAUDS.

SCIRE FACIAS.

See MORTGAGES, 11, 12.

SEDUCTION.

ACTIONS FOR SEDUCTION ARE FOUNDED IN PURE WRONG upon the rights of the master in the person of the servant, for which trespass or case will lie. *Fairmount R'y Co. v. Stutler*, 714.

SET-OFF.

1. TO JUDGMENT THERE CAN BE NO SET-OFF OF DEBT NOT IN JUDGMENT. *Thorp v. Wegfarth*, 789.
2. ONE JUDGMENT MAY BE SET OFF AGAINST ANOTHER THROUGH EQUITABLE POWERS OF COURT; but to a judgment ripe for execution there can be but one answer, to wit, payment pure and simple. *Id.*
3. STATE BANK NOTES INEFFECTUAL AS SET-OFF WHEN. — A national bank association was organized from a state bank. Such association recovered judgment for a debt due it, and afterwards became insolvent. The debtor then procured notes of the original state bank, which the association was liable for, to pay his debt. *Held*, that he had no right of set-off against the judgment. *Id.*

SHERIFFS.

See COSTS, 2; EXECUTIONS, 3.

SHIPPING.

MASTER OF VESSEL WHO IS ALSO PART OWNER DOES NOT, BY VIRTUE THEREOF, have a special privilege called or known as a sailing or master's interest, which will prevent the owners of a majority interest in the vessel from displacing him as master at their pleasure. *Ward v. Ruckman*, 479.

See JURISDICTION, 1; MORTGAGES, 3.

SLANDER.

1. WHETHER SLANDEROUS WORDS ARE ACTIONABLE IN THEMSELVES as imputing criminality, without alleging special damages, depends upon whether

the charge, if true, would subject the party charged to indictment for a crime involving moral turpitude, or subject him to an infamous punishment. *Alfele v. Wright*, 615.

2. WORDS CHARGING FEMALE WITH WANT OF CHASTITY, or which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable *per se* in Ohio. But this rule is not extended to one of the male sex, where the words are of similar character. *Id.*
3. WORDS WHICH CHARGE MAN WITH GROSS DISHONESTY, for which, if true, he would be liable in a civil action, but which do not import a charge of burglary, larceny, or other crime, are not actionable *per se*. The rule is here applied to words spoken by one partner against the other. *Id.*
4. ALLEGED SLANDEROUS WORDS DO NOT IMPUTE ANY CRIMINAL OFFENSE, unless it appears from the record that the words set forth, by their natural signification, when interpreted in the light of the extrinsic facts alleged, are fairly capable of such a meaning. *Goodrich v. Hooper*, 49.
5. MEANING OF ALLEGED SLANDEROUS WORDS CANNOT BE ENLARGED BY INNUENDOES to impute a criminal offense, and where the words set out are not capable of such construction, the declaration will be adjudged bad on demurrer. The language must be read and interpreted by the court as it would ordinarily be understood by mankind. *Id.*
6. NO INNUENDOES ARE NECESSARY UNDER MASSACHUSETTS SYSTEM OF PLEADING; but if the natural import of the words is not intelligible without further explanation or reference to facts understood but not mentioned, or parts of the conversation not stated, the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken: See Gen. Stats., c. 129, sec. 87. *Id.*
7. WORDS WHICH DO NOT IMPUTE ANY CRIMINAL OFFENSE, AND WHICH ARE NOT ACTIONABLE. — In tort for slander, the declaration alleged that in conversations concerning the plaintiff, and his acts as collector of customs, in reference to the settlement of a claim in behalf of the United States against W., the defendant used these words: "G. [the plaintiff] had not accounted to the department for the sum paid by W., by some \$32,000"; and also words substantially as follows: "That in the settlement for the alleged frauds by W., amounting to many hundreds of thousands of dollars, the amount paid by W. was \$157,224; that only \$125,224 was accounted for; that it was not known what had been done with the balance; and it was understood that this settlement was made through the intervention of S. and his partner, the late deputy collector; that it was discreditable to the government to have it generally known that the sum of \$157,224 was paid by W. in a settlement with the government, and that \$32,000 of that sum was not accounted for." *Held*, on demurrer, that these words did not by their natural sense and meaning impute to the plaintiff any criminal offense, and were not actionable, although the plaintiff by innuendoes averred that they imputed to himself the crimes of embezzlement and of receiving a bribe, and were so understood in the conversations alleged. *Id.*

SPECIFIC PERFORMANCE.

1. EQUITY WILL ENFORCE PAROL AGREEMENT between two that one will purchase land for the other, and take the title to himself and hold it for such

- other until the latter can pay for it, and when paid for will convey it to him. *Cohn v. Chapman*, 603.
2. SPECIFIC PERFORMANCE OF PAROL CONTRACT FOR SALE OF LAND WILL NOT BE ENFORCED unless a contract, clear, definite, and unequivocal in its terms is admitted by the answer or satisfactorily established by competent proof. *Poland v. O'Connor*, 327.
 3. SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND WILL NOT BE DECREED, where the vendee has been guilty of gross negligence; nor will a court of equity allow parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and, according to the event, either abandon it, or, considering the lapse of time as nothing, claim a specific performance. *McAusland v. Pundt*, 358.

SPENDTHRIFTS.

1. IT IS COMPETENT FOR STATUTE TO MAKE ADJUDICATION OF SPENDTHRIFT'S DISABILITY relate back to the time of the commencement of proceedings against him; history of legislation upon this subject given. *Chandler v. Simmons*, 117.
2. CONTRACT OF SPENDTHRIFT, WHEN VOID — RATIFICATION OF MINOR'S CONTRACT, WHEN VOID. — Under section 10, chapter 109, General Statutes of Massachusetts, 1860, all contracts of a spendthrift, except for necessities, and all sales or transfers of property made by him pending proceedings against him, are void; and an adult's ratification by a sealed instrument of a conveyance of real estate made by him while a minor is a void contract, if executed after a copy of a complaint, under section 9, chapter 109, of said statutes, to place him under guardianship as a spendthrift, and of the order of notice thereon, has been filed in the registry of deeds, and after a guardian has been appointed by the probate court, and while an appeal is pending in this court, which afterwards affirms the decree of appointment. *Id.*
3. SPENDTHRIFT UNDER GUARDIANSHIP CANNOT EVEN MAKE ACKNOWLEDGMENT that will take his debt out of the statute of limitations; but his guardian may bind the ward's estate by such an acknowledgment. *Id.*

STATUTE OF FRAUDS.

1. ORAL AGREEMENT WHICH MAY OR MAY NOT BE FULLY PERFORMED WITHIN ONE YEAR IS NOT WITHIN THAT CLAUSE OF STATUTE OF FRAUDS which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to support an action thereon. *Doyle v. Dixon*, 80.
2. AGREEMENT IS NOT WITHIN ONE-YEAR CLAUSE OF STATUTE OF FRAUDS if it will be completely performed according to its terms and intention, if either party should die within the year. *Id.*
3. IF AGREEMENT CANNOT BE COMPLETELY PERFORMED WITHIN ONE YEAR, the fact that it may be terminated or further performance excused or rendered impossible by the death of the promisee or of another person within a year is not sufficient to take it out of the statute of frauds. *Id.*
4. IF DEATH OF PROMISOR WITHIN ONE YEAR MERELY PREVENTS FULL PERFORMANCE OF AGREEMENT, it is within the one-year clause of the statute of frauds; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. *Id.*

5. **AGREEMENT NOT TO ENGAGE IN CERTAIN KIND OF BUSINESS AT PARTICULAR PLACE** for specified number of years or hereafter is not within that provision of the statute of frauds which requires agreements not to be performed within one year from the making thereof to be in writing in order to support an action thereon. *Id.*
6. **TELEGRAM ACCEPTING OFFER BY TELEGRAPH TO SELL**, together with letter of same date signed by same party and to the same effect, afford sufficient evidence of subscription by said party to take the case out of the statute of frauds. *Trevor v. Wood*, 511.
7. **ORAL CONTRACT FOR SALE OF PERSONAL PROPERTY IS VALID**, though under the statute of frauds some memorandum in writing signed by the defendant may be necessary to enable the plaintiff to enforce it. *Hunter v. Giddings*, 54.
8. **WRITTEN MEMORANDUM OF CONTRACT BETWEEN H. AND G., AND SIGNED BY G. WITH HIS OWN NAME, IS SUFFICIENTLY EXECUTED WITHIN STATUTE OF FRAUDS** to enable H. to enforce the contract, although H.'s name was signed to the memorandum by an attorney in fact, without adding his own name as attorney, and the memorandum contained nothing to indicate that it was executed by him as attorney, and although G., the party sought to be charged, supposed that he was contracting with the attorney personally, and that the signature which the attorney affixed was his own name; and if it is set up in defense, against the enforcement of the contract, that such supposition was caused by fraud or pretense of the attorney, that is for the jury, and not for the court, to pass upon. *Id.*
9. **VENDEE'S TITLE CANNOT BE CONTESTED AS BEING WITHIN STATUTE OF FRAUDS**, because the contract of sale was verbal, by one who advanced the unpaid purchase-money to the vendor, taking from him a deed as security therefor. *Houser v. Lamont*, 755.
10. **STATUTE OF FRAUDS CANNOT BE USED BY PLAINTIFF IN EJECTMENT**, so as to convert a mortgage in the form of a deed into an absolute conveyance, where the purchaser of property at an orphans' court sale agreed verbally to sell it to the defendant, and received part of the purchase-money, but took the deed in his own name as security for the balance, which was afterwards advanced to him by the plaintiff, to whom he made a deed of the property as security therefor. *Id.*
11. **POSSESSION TAKING PAROL CONTRACT FOR SALE OF LAND OUT OF STATUTE OF FRAUDS** is not shown by proof that the vendee used the lot which adjoined his warehouse for storing lumber and wagons. *Poland v. O'Connor*, 327.
12. **IT IS NOT EVERY POSSIBLE ACT OF VENDEE, DONE WITH REFERENCE TO PAROL CONTRACT** for sale of land, that will remove it from the statute of frauds, but only those to which he has been induced by positive action or permission of the vendor; or at most by those results that naturally flow from the agreement. *Id.*
13. **PURCHASE OF BUILDING BY VENDEE IN PAROL CONTRACT FOR SALE OF LAND**, with a view to placing it on the premises, will not take the contract out of the statute of frauds. *Id.*
14. **PAYMENT OF PORTION OF PURCHASE PRICE IS NOT PART PERFORMANCE** taking parol contract for sale of land out of the statute of frauds. *Id.*
15. **TO TAKE PAROL CONTRACT FOR SALE OF LAND OUT OF STATUTE OF FRAUDS** there must be unequivocal and satisfactory evidence of possession given

and entered upon, or of acts clear, certain, and definite in their object, and having reference to the contract. *Id.*

16. ACTS OF POSSESSION DONE AFTER VENDOR HAS DISAVOWED PAROL CONTRACT for sale of land, made by an unauthorized agent, are without warrant, and will not take the contract out of the statute of frauds. *Id.*
17. PENNSYLVANIA STATUTE OF FRAUDS DOES NOT APPLY TO PAROL CONTRACTS FOR SALE OF LANDS IN ANOTHER STATE, and does not avoid such contracts though made in Pennsylvania. *Seigel v. Robinson*, 775.

STATUTE OF LIMITATIONS.

NON-RESIDENCE OF PARTY CLAIMING REAL ESTATE does not affect or qualify the provisions of section 5 of the Nevada statute of limitations. *Chollar-Potosi M. Co. v. Kennedy*, 409.

STATUTES.

IN AMENDING LAW, LEGISLATURE MAY SUBSTITUTE ANY PROVISION they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted. *Underwood v. McDuffee*, 194.

See CONSTITUTIONAL LAW.

SUBROGATION.

1. SUBROGATION IS EQUITABLE RESULT PURELY, and depends on facts to develop its necessity, that justice may be done. *Mosier's Appeal*, 783.
2. PRIVITY OF CONTRACT IS NOT NECESSARY TO SUPPORT SUBROGATION. It exists upon principles of mere equity and benevolence. *Id.*
3. SUBROGATION WILL NOT ARISE IN FAVOR OF MERE STRANGER, but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. *Id.*
4. SUBROGATION DOES NOT APPLY IN FAVOR OF MERE VOLUNTEERS. They can obtain the right of substitution only by contract. *Id.*
5. CASES ILLUSTRATING WHO ARE NOT TO BE REGARDED AS VOLUNTEERS AND STRANGERS with respect to the right of subrogation. *Id.*
6. SUBROGATION IS APPLICABLE WHEREVER PAYMENT IS MADE under a legitimate and fair effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated. *Id.*
7. ENTRY OF SATISFACTION OF JUDGMENT DOES NOT EXTINGUISH JUDGMENT except in favor of intervening liens. *Id.*
8. EXAMPLE OF PRINCIPLES OF SUBROGATION APPLIED. — A number of judgments were entered against two debtors, some joint and some several, executions were issued, and land held jointly by them was levied on. The court ordered the undivided interest of one of the debtors to be sold separately. A junior judgment creditor, believing the land would be sacrificed, after the execution plaintiffs had refused to assign their judgments to him on payment, paid the executions to the sheriff, and satisfaction was entered. No other liens having intervened, he was subrogated to the rights of the execution plaintiffs, and the satisfaction canceled. *Id.*

SURETYSHIP.

See ATTACHMENT, 5, 6; BONDS; SUBROGATION.

TELEGRAPHS.

1. **TELEGRAPH COMPANY IS GUILTY OF GROSS NEGLIGENCE**, and is therefore liable to the sender of the message for such damage as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination. *United States Tel. Co. v. Wenger*, 751.
2. **MEASURE OF DAMAGES FOR FAILURE OF TELEGRAPH COMPANY TO TRANSMIT MESSAGE** ordering the purchase of certain stocks, which were afterwards bought under another order at advanced prices, is such advance, that being the damage which must reasonably be presumed to have been contemplated by the parties, since the message disclosed the nature of the business to which it related, and its object was to buy stock as soon as received, no other time being named. *Id.*
3. **DECLARATIONS OF BROKERS AS TO REASON WHY THEY DID NOT BUY STOCK** on the receipt of a letter ordering its purchase are not admissible in favor of the principal, in an action by him against a telegraph company to recover damages for the failure to transmit a previous message to the brokers ordering the purchase, the declarations not being *res gestæ* in regard to the contract to send the message. *Id.*
4. **LIABILITY OF TELEGRAPH COMPANY FOR NEGLIGENCE IN DELIVERING MESSAGE.** — The blanks of a telegraph company contained certain terms and conditions, limiting to a small sum the liability of the company for error or delay in the transmission or delivery of any message. The company received a message written upon one of these blanks, addressed to a place on the line of a second company, collected pay for its transmission the whole distance, forwarded it to the terminus of its own line, and there delivered it to the second company, which forwarded it to its destination. *Held*, that the second company could not avail itself of the terms and conditions in the blank limiting the liability of the first company, and thus escape liability for negligence in delivering the message. *Squire v. Western Union Tel. Co.*, 157.
5. **MEASURE OF DAMAGES FOR NEGLECT OF TELEGRAPH COMPANY TO SEASONABLY DELIVER MESSAGE** agreeing to accept an offer to sell goods at a certain price, in consequence of which the bargain is lost, is the additional sum which the plaintiff would have been compelled to pay at the same place to obtain the same quantity of similar goods. *Id.*
6. **OPINION OF BROKER IS NOT ADMISSIBLE** as to the certainty that stock could have been purchased at the quotation prices, at a certain time, in an action against a telegraph company for its failure to transmit a message to brokers, ordering the purchase of certain stocks. *U. S. Telegraph Co. v. Wenger*, 751.

See CONTRACTS, 3.

TENDER.

CROSS IN ACTION AGAINST CREDITOR IS NOT GOOD TENDER IN PAYMENT OF JUDGMENT of execution. *Thorp v. Wegefark*, 789.

See PLEADING AND PRACTICE, 2.

TITLE.

GENERAL RULE THAT DERIVATIVE TITLE CANNOT BE BETTER than that from which it is derived is subject to many necessary exceptions. *McAuland v. Pundt*, 358.

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TORTS.

NO LEGAL REMEDY EXISTS FOR TORTS SPRINGING FROM CONTRACT which consist in a mere omission of a contract duty, except by an action on the case, which must be by the party injured, and cannot be by the master. *Fairmount Co. v. Statler*, 714.

TRESPASS.

ENTRY BY HOLDER OF MORTGAGE UPON ONE OF SEVERAL DETACHED LOTS OF WILD AND UNOCCUPIED LAND in the same county, in the name of all, gives him constructive legal possession of all, so that he may maintain trespass against any person afterwards entering without right upon any of the other lots, if the lots are covered by the same mortgage, upon the same condition. *Green v. Pettingill*, 444.

TROVER.

See CO-TENANCY, 6.

TRUSTS.

1. **ONE WHO TAKES CONVEYANCE OF REAL ESTATE IN TRUST FOR MARRIED WOMAN MAY MORTGAGE** the same to secure the payment of the purchase-money, where the deed and mortgage are executed at the same time, and form part of the same transaction. *Marrich v. Grier*, 373.
2. **CESTUI QUE TRUST IS NECESSARY PARTY TO SUIT FOR FORECLOSURE** of a mortgage executed by a trustee upon the trust estate; and if such *cestui que trust* be a married woman, her husband is also a necessary party. *Id.*
3. **RESULTING TRUST IS CREATED IN CREDITOR FOR DEBTOR** as to a part of the debtor's land which the creditor verbally agreed to reconvey to the debtor, if he would waive his exemption and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be bought in by the creditor. *Beegle v. Wentz*, 762.
4. **RESULTING TRUST WILL BE UPHOLD**, although the title to the land is acquired through a judicial sale. *Id.*
5. **RESULTING TRUST WILL BE UPHOLD AGAINST OBJECTION OF UNCERTAINTY**, where a creditor verbally agreed to reconvey to the debtor fifteen acres of land around the debtor's house, part of a tract of fifty-eight acres, if the debtor would waive his exemption, and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be bought in by the creditor. The law presumes that the land was meant to be laid off in a reasonable shape, and the parties can afterwards do it, or if one will not, the other can, on notice. *Id.*

See EQUITY, 7.

USAGE.

1. **CUSTOM OR USAGE WILL NOT BE ALLOWED TO EXTEND RIGHT TO ACT FOR** and receive compensation from both parties to matters in which the interests of the parties are or may be diverse. *Walker v. Osgood*, 168.
2. **ANY USAGE, IN ORDER TO BE OPERATIVE AS SHOWING FULFILLMENT OF CONTRACT**, must be reasonable, and be of such a nature that it does not in any degree tend to controvert the well-established rules of law. *Reed v. Richardson*, 155.

See COMMON CARRIERS, 26; CUSTOMS.

USURPATION.

See CORPORATIONS, 8-11.

USURY.

WHERE AGREEMENT FOR LOAN OF MONEY IS MADE IN NEW YORK, and the money there advanced, a note payable in New York, and given as security pursuant to the terms of the agreement, though made in Nebraska, is a mere incident of the agreement, and is governed by the laws of New York; and therefore it may be void by reason of the usury laws of that state, though valid according to the laws of Nebraska. *Sands v. Smith*, 331.

VENDOR AND VENDEE.

1. **GRANTOR IS DEFINED TO BE ONE WHO GIVES, BESTOWS, OR CONCEDES a thing, and in legal parlance is understood to be one who executes a deed or conveyance, and may be distinguished from a vendor, who is a seller, or a person who disposes of a thing for money. *Russell v. Watt*, 270.**
2. **VENDOR'S LIEN MAY BE ENFORCED IN FAVOR OF ONE WHO IS NOT GRANTOR of the land, and though the deed to the vendee is executed by a third person. Thus the owner of land made a parol gift of it to his daughter. She sold the land to another, taking his notes for the price. The grantor executed the conveyance to the vendee, and the price not having been paid, the vendee (the daughter) was permitted to enforce her lien therefor. *Id.***
3. **PURCHASER OF LAND FROM ONE WHO ACQUIRED IT BY PAROL GIFT from her father, and who gave to her vendee her father's conveyance of the same, is estopped, in an action by the vendor for the price, from setting up as a defense that the gift to the daughter was void because not in writing, or from setting up title adverse to that conveyed by the deed. *Id.***
4. **VENDOR MAY FILE BILL TO ENFORCE HIS LIEN UPON FAILURE OF VENDEE TO PAY, although the price was to be paid in specific articles, and not in money. *Harvey v. Kelly*, 267.**
5. **EXPRESS RESERVATION OF VENDOR'S LIEN IN DEED AMOUNTS TO EQUI- TABLE MORTGAGE; and the rights of the vendor and vendee depend on their contract, and not on mere implication of law. *Id.***
6. **TO CREATE VENDOR'S LIEN, THERE MUST BE DEBT FOR UNPAID PURCHASE- MONEY in fixed amount, due directly to the vendor. If the vendee's ob- ligation consists of a collateral covenant, or is for the discharge of the liability of a third person, and the conveyance is absolute, no lien is retained. *Id.***
7. **VERBAL SALE OF LAND MAY BE SUSTAINED BY VENDOR'S OATH in favor of the vendee. *Houser v. Lamont*, 755.**
8. **PURCHASER WHO BECOMES UNABLE TO RETURN PROPERTY BEFORE HE DISCOVERS DEFECT OF TITLE of the vendor is remediless unless he has protected himself by covenants of warranty; and this rule applies to sales by executors and administrators. *Ware v. Houghton*, 258.**
9. **WANT OF TITLE CANNOT BE SET UP AGAINST PAYMENT OF PURCHASE- MONEY by vendee of real property who has protected himself by cove- nants of warranty, unless he shows a previous eviction, or in cases where there has been fraud; and this rule applies to personal as well as real property. *Id.***
10. **PURCHASER FROM VENDOR WITH NOTICE TAKES SUBJECT TO EQUITIES OF VENDEE, and this notice may be actual personal notice, or it may arise**

from open and notorious possession of the land by the vendee. *Filley v. Duncan*, 337.

11. WHERE JUDGMENT IS RECOVERED AGAINST VENDOR OF LAND OF WHICH VENDEE IS IN POSSESSION, and the land is sold under the judgment, the vendee who has without notice of the judgment completed his purchase, and received a deed from his vendor before the sheriff's sale, may sustain a bill in equity to have the sheriff's deed declared void, and the possession of the premises decreed to the plaintiff. *Id.*
12. PARTY WILL BE PRESUMED TO HAVE INTEREST IN LAND that he could sell or assign, and which a court of equity would recognize and protect in the hands of his vendee or assignee, where at the time of the contract of sale he was in possession, cultivating the premises, and afterwards acquired a complete legal title. *Id.*
13. VENDOR WHO CONTRACTS TO CONVEY ESTATE WHICH HE HAS NOT at the time will be compelled to specifically perform his contract if he afterwards becomes the owner. *Id.*
14. LIEN OF JUDGMENT RECOVERED AGAINST VENDOR OF LAND attaches only to his interest in it, and while the contract of sale subsists extends only to the unpaid balance of the purchase-money. *Id.*
15. ENTRY OF JUDGMENT AGAINST VENDOR OF LAND IS NOT CONSTRUCTIVE NOTICE to vendee in possession, and subsequent payments to the vendor are not at his peril. *Id.*
16. ACTUAL NOTICE GIVEN BY JUDGMENT CREDITOR TO VENDEE of the entry of his judgment against the vendor will not, it seems, make subsequent payments by the vendee to the vendor payments at his peril. *Per Crounse, J. Id.*
17. JUDGMENT CREDITOR WHOSE LIEN ATTACHES TO UNPAID PURCHASE-MONEY on a contract of sale may, by a proceeding in the nature of a creditor's bill, enjoin subsequent payments by the vendee until the rights of the parties are determined. *Id.*
18. FAILURE OF VENDEE TO INFORM HIMSELF ON SUBJECT as to which the notice of sale was silent cannot be imputed as a wrong to the vendor, who neither said nor did anything to mislead him. *Hendricks v. Stark*, 549.
19. AGREEMENT TO CONVEY LAND IF VENDEE SHOULD FIND OIL UPON IT IS TO BE CONSTRUED as an agreement to convey the land if oil should be found within a reasonable time. *Dark v. Johnston*, 732.
20. PARTY CONTRACTING IN WRITING TO SELL LOT OF LAND, AND "TO CONVEY AND RELEASE the same to the vendee by a good and sufficient deed," binds himself to give a good title to such land; and when he has given such a deed in pursuance of the agreement, he cannot complain that its covenants protect the vendee from certain liens which it was verbally understood he should be liable for. *Story v. Conger*, 546.
21. INSTANCES IN WHICH VENDEE MAY DENY VENDOR'S TITLE CONSIDERED. *Smith v. Babcock*, 498.
22. TITLE OF VENDOR MAY BE DENIED IN ACTION BY HIM to recover damages for the removal by the defendants under the direction of the vendee, and while the premises were in the latter's possession under a contract of purchase, which was subsequently rescinded, of buildings which were standing upon said premises. The defendants, having made no contract with the vendor, are trespassers merely, so far as he is concerned, and the idea of estoppel or privies is inapplicable, and it is therefor, and for the reason that they are liable to the real owner only for an injury

to the reversion, that they may show that the plaintiff is not such owner. *Id.*

23. **NEGLECT OF VENDER TO COMPLY WITH HIS AGREEMENTS IS NOT EXCUSED** by the circumstance that the title to the land was in litigation, if the litigation was pending when the contract was made, and an adverse determination was provided against by the vendee by taking the guaranty of a third person. *McAusland v. Pundt*, 358.

See **BROKERS; EJECTMENT, 2; ESTOPPEL; POWERS; STATUTE OF FRAUDS.**

WAREHOUSEMEN.

See **COMMON CARRIERS, 13, 14.**

WAYS.

1. **WORDS "ROAD" AND "WAY" ARE NOT SYNONYMOUS.** A road is any piece of land used or appropriated for travel, and is a very different thing from a mere right of way. *Chollar-Potosi M. Co. v. Kennedy*, 409.
2. **FIVE YEARS' UNINTERRUPTED ENJOYMENT OF RIGHT OF WAY** over public land appropriated for a road establishes a prescriptive right to continue to enjoy the same. *Id.*
3. **PARTY ASSUMING AND EXERCISING RIGHT OF WAY OPENLY**, notoriously, and continuously, without asking the consent of the owner of the land, and without manifesting in any way that he is exercising the right as a favor or license given him by the owner of the soil, must be considered as holding adversely. *Id.*
4. **PARTY RELYING UPON RIGHT OF WAY BY PRESCRIPTION NEED NOT IN PLEADING AVER** that he enjoys the right of way by prescription. It is sufficient for him to aver that he has enjoyed the right of way for a period long enough to have established his right. *Id.*

See **EMINENT DOMAIN, 4, 5.**

WILLS.

1. **INSTRUMENT WILL BE ESTABLISHED AS OLOGRAPH WILL**, notwithstanding the fact that it has upon it an attestation clause unwitnessed. *Hill v. Bell*, 583.
2. **PLACING OF OLOGRAPH BY TESTATOR AMONG HIS VALUABLE PAPERS** and effects satisfies the requirements of the statute on the matter of deposit. *Id.*
3. **TESTAMENTARY CAPACITY — EVIDENCE.** — A testator made a will after he was found to be a lunatic with lucid intervals: *held*, in a feigned issue on this will, that instructions given by him a short time before he was found lunatic, for another will, which was drawn accordingly, and which differed from that in dispute, were admissible in evidence on the question of testamentary capacity. *Tillow v. Tillow*, 691.
4. **CHANGE OF INTENTION ON PART OF TESTATOR IN RELATION TO HIS WILL** is of no importance, if there was a sound mind unconstrained; but when the question is, whether there was such a mind, such change may be adduced to aid the inquiry. *Id.*
5. **FREQUENT DECLARATIONS MADE BY TESTATOR WITHIN TEN YEARS BEFORE HIS DEATH** that he liked a brother better than his other relations can have no bearing on the question of the testator's sanity. *Id.*
6. **LEGATEE UNDER PRIOR WILL IS COMPETENT WITNESS AGAINST SUBSEQUENT WILL IN CONTEST.** *Id.*

7. **DECLARATIONS OF LEGATEE MADE BEFORE WILL WAS MADE**, whose interests under the will are less than those under the intestate laws, are not evidence against the will, though he be a party to the issue. *Id.*
8. **SUBSCRIBING WITNESSES TO WILL MAY GIVE THEIR OPINION OF TESTATOR'S CAPACITY**, without having previously testified to any facts as the ground of it, but other witnesses may not. *Id.*
9. **FINDING OF LUNACY, WITH LUCID INTERVALS**, CASTS the burden of proving mental capacity on those propounding the will of the alleged lunatic. *Id.*
10. **FRAUD OR UNDUE INFLUENCE TO INVALIDATE WILL** must have some effect upon the testator in producing the very act of making his will. *Monroe v. Barclay*, 620.
11. **UNDUE INFLUENCE TO AVOID WILL** is a question of fact for the jury. *Id.*
12. **WILL CANNOT BE INVALIDATED FOR UNDUE INFLUENCE** in the absence of fraud, no matter by what influence a testator may be moved, so long as he is put under no restraint which overpowers his inclinations and judgment, and induces a disposition of his property contrary to his own wishes and desires. *Id.*
13. **WILL CANNOT BE INVALIDATED BECAUSE PRODUCED** by influences springing from a lawful or unlawful marital relation, unless such influence has been unduly exerted; and to have the effect of avoiding the will, the influence must place some restraint upon and prevent the free exercise of the testator's judgment and motives in making the will. *Id.*
14. **UNDUE INFLUENCE GROWING OUT OF UNLAWFUL MARITAL RELATIONS** to avoid a will should be left with the other evidence for the jury to determine. *Id.*
15. **CLAUSE IN WILL IS IMPERATIVE**, and entitles the beneficiary to whatever sum is necessary to his support during his life, when it provides that the executor shall provide for the wants of the beneficiary as a matter of humanity rather than legal obligation, and also provides that the interest on a certain sum shall be set apart for his support, directs its application to that purpose, and disposes of any surplus remaining unexpended at his death. *Chambers v. Davis*, 605.
16. **WHERE RESIDUARY FUND IS GIVEN BY WILL** to the children, *nominatim*, by the testator, or where it is given to a certain number of the children to be equally divided between them, if one of them die before the testator, his or her share will lapse, but will not fall into the residue for the benefit of the others. Such lapsed residuary share must be distributed among the next of kin of the testator. *Winston v. Webb*, 599.

WITNESSES.

1. **CROSS-EXAMINATION—INQUIRY INTO ANTECEDENTS AND CHARACTER OF WITNESS.**—Witnesses may be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. It is within the discretion of the court how far this inquiry may go, but within this discretion a witness may be asked concerning all antecedents which are really significant. *Wilbur v. Flood*, 203.
2. **WITNESS MAY BE ASKED, ON CROSS-EXAMINATION, IF HE HAS EVER BEEN CONFINED IN STATE PRISON.** It is not necessary to produce the record of the conviction. *Id.*

See CRIMINAL LAW, 9.

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